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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No._____

SEATTLE SCHOOL DISTRICT NO. 1, et al.

Appellees,

v.

STATE OF WASHINGTON, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal raises significant new questions about the extent to which the Fourteenth Amendment inhibits state action when racial distribution of students in public schools is involved. Principal among them is the following question which was alluded to, but not answered, by this Court in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977):[1]

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[1] *I.e.*, the constitutionality of actions designed to "* * * undo operative regulations affecting the assignment of pupils * * *" *Dayton, supra*, at page 413. This case involves just such a state statute. In *Dayton*, however, this Court went on to say, at page 413:

"* * * We agree with the Court of Appeals' treatment of

I.

Absent any constitutional duty on the part of a local school board to implement a racially-oriented mandatory bussing program, once such a program is underway, may it ever be discontinued without violating the Fourteenth Amendment?

The remaining questions presented by this appeal are:

II.

Once a racially-oriented mandatory bussing program has begun in a non-segregated school district, may the pre-existing racially-neutral neighborhood school assignment policy only be restored by the local school board which abandoned it, or may it be restored by the superior legislative authority of the state through enactment of a law applicable to all local school districts?

III.

Does a state statute which does not explicitly use race as a criterion nevertheless create an impermissible racial classification solely because it addresses specifically a subject which has a racial nexus?

IV.

Does statutory restoration of a neighborhood school assignment policy constitute racially discriminatory state action when accomplished in response to a mandatory bussing program designed to achieve a particular level of racial distribution of public school students deemed to be desirable by a local school board?

[the Board's] action, wherein that court said:

" 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took * * * If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. * * *' Brinkman v. Gilligan, 503 F2d 684, 697 (1974)."

V.

Where record evidence shows nondiscriminatory intent on the part of voters adopting a state-wide initiative, does a district court err by finding that the legislation was motivated by an intent to discriminate on racial grounds while refusing even to consider such evidence?

VI.

Where a state statute is modeled closely on a federal statute explicitly intended to foster a national policy in favor of neighborhood school assignment of public school students and to inhibit the use of mandatory bussing to achieve racial distribution in public schools, is there a recognized constitutional ground for upholding the federal law while striking down the state law?

VII.

Where state officials involved in implementing a state law interpret it in a manner which eliminates a particular constitutional inquiry, it is error for a federal court to interpret that law in a contrary manner, rendering it constitutionally suspect?

VIII.

(A) Are political subdivisions of a state, such as school districts, within the ambit of 20 U.S.C. § 3205 and 42 U.S.C. § 1988, so as to entitle them to attorneys' fees when they prevail in suits against the state?

(B) If political subdivisions are so entitled, does a district court abuse its discretion under those statutes by refusing to order a state to pay the attorneys' fees of school district plaintiffs upon a finding that the district's prosecution of the litigation has already been funded by that state?

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PARTIES TO THESE PROCEEDINGS

All original and substituted parties to these proceedings, other than intervenors, are listed in the Notice of Appeal to this Court which is reprinted as Appendix D. The intervenor parties are listed in the footnote below.[2]

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Memorandum Opinion of the U.S. District Court for the Western District of Washington, entered on June 15, 1979,

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[2]The "Seattle intervening plaintiffs" are the following:

American Civil Liberties Union, American Friends Service Committee; Church Council of Greater Seattle; Loren Miller Bar Association; Seattle Branch, National Association for the Advancement of Colored People; Seattle Urban League; Seattle Chapter of the American Jewish Committee; Ann and Paul Siqueland, individually and as parents and guardians ad litem for Nadine Siqueland, Michele Siqueland and Bruce Siqueland; Constance and Roger Proctor, individually and as parents and guardians ad litem for Kendra Proctor; Samuel and Haruko Shoji, individually and as parents and guardians ad litem for Jay Michael Shoji and Brian Thomas Shoji; Roberto and Marie Esther Gallegos, individually and as parents and guardians ad litem for Roberto P. Gallegos; Lembhard and Patricia Howell, individually and as parents and guardians ad litem for Helen Howell and Elizabeth Howell; Daniel and Sara Levant, individually and as parents and guardians ad litem for David Levant; Gary and Linda Higashi, individually and as parents and guardians ad litem for Jeffrey Higashi, Andrew Higashi, and Julie Higashi; Paul and Cecilia Layton, individually and as parents and guardians ad litem for Brian Layton; Dr. Bill and Ellen Hazzard, individually and as parents and guardians ad litem for Russell Hazzard and Daniel Hazzard; Oscar Conyears, individually and as parent and guardian ad litem for Tandra Conyears; Tyra Elliott, individually and as parent and guardian ad litem for Jai Elliott.

The "Pasco intervening plaintiffs" are the following:

East Pasco Neighborhood Council; Thelma Brown; Mrs. McClendon; Leon Henderson and Ruby Henderson; Jesus Mendez Diaz; Jose Tovar and Elia Tovar; Joaquin Angie Nunes; Refugio Madrigal and Demetria Madrigal; Abel Torres and Guadalupe Torres; Antonio Mendez and Ramona Mendez; Alejo Velasquez and Maria Velasquez; Inosencio Galvez and Natalia Galvez; Manual Zamora and Linda Zamora; and Angel Galvez and Guadulepe Galvez.

In addition, the United States was allowed to intervene as a party plaintiff and CiVIC (Citizens for Voluntary Integration Committee) was allowed to intervene as an additional defendant.

are reported at 473 F. Supp. 996. The December 16, 1980 opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit is reported at 633 F.2d 1338. These opinions comprise Appendices A and B to this Jurisdictional Statement.

JURISDICTION

This appeal is taken from a Judgment of the Court of Appeals for the Ninth Circuit holding a state statute, Initiative 350 (now codified as chapter 28A.26 RCW), invalid as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Ninth Circuit affirmed a judgment of the United States District Court for the Western District of Washington holding the act invalid, but largely reversed a separate order of the district court denying attorneys' fees to the plaintiff school district and intervenors.

The state defendants appealed to the Ninth Circuit on September 19, 1979. This was followed by cross-appeals of the district court's denial of several petitions for awards of attorneys' fees. These were consolidated, briefed and argued to a three-judge panel of the Ninth Circuit on June 30, 1980. On December 16, 1980, the Ninth Circuit filed its majority and dissenting opinions.

The state defendants thereafter filed a Petition for Rehearing and Suggestion for En Banc Determination which was denied by order filed on March 26, 1981. A copy of that order is Appendix E. Appeal is now taken to this Court pursuant to 28 U.S.C. § 1254(2). A copy of the Notice of Appeal filed with the Clerk of the Ninth Circuit on May 18, 1981, is Appendix D to this Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[3]

United States Constitution, Fourteenth Amendment (Equal Protection Clause).

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[3]These constitutional and statutory provisions are set out in Appendix F.

Washington State Constitution, Article IX.

Initiative Measure No. 350 (now codified as chapter 28A.26, Revised Code of Washington).

20 U.S.C. § 1701, *et seq.* (Equal Educational Opportunities Act of 1974).

42 U.S.C. § 1988 (1976 Civil Rights Attorneys' Fees Award Act).

20 U.S.C. § 3205 (Allowing awards of attorneys' fees in certain educational cases).

STATEMENT OF THE CASE

1. The Statute.

Initiative 350 provides in Section One (now codified as RCW 28A.26.010) that:

> "* * * no * * * school district * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *"

Several exceptions are then carved out of its central policy, however, allowing extra-neighborhood assignment in the following instances:

> " * * *
>
> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hzards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

One important additional exception is embodied in Section Six (RCW 28A.26.060) as follows:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

From the outset of the litigation, the State has interpreted the foregoing provision to allow Washington school districts to assign students away from their neighborhood schools where the state or federal constitution requires them to do so.

Aside from this express subordination of its central policy to constitutional imperatives, though, there is no doubt that Initiative 350 was tailored, in major part, to deal with large-scale, racially-oriented mandatory bussing programs. This legislative specificity highlights the importance of Questions III and IV, page ii, *supra*.

2. **Factual Background.**

Since its admission to the Union in 1889, the State of Washington has operated a unitary public school system in which all children are afforded equal educational opportunity.[4] So far as is known, no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools. And during the past 30 years or so, the state legislature has enacted a comprehensive set of statutes designed to protect and enhance the exercise of civil rights by all persons within the state.[5]

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[4]The Washington Constitution, since its adoption in 1889, has always provided in Article IX, § 1 that,

> "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, *without distinction or preference on account of race, color, caste, or sex*." (Emphasis supplied)

[5]Beginning five years before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Washington legislature began constructing a comprehensive scheme of civil rights law. The many statutory provisions enacted to protect against racial discrimination include: RCW 9.91.010 (making it a misdemeanor to deny the full enjoyment of any public facilities by acts "directly or indirectly" causing persons of any race to be treated as not welcome); RCW 18.85.230 (prohibiting discrimination in hiring or sales activity by real estate workers and salesmen); RCW 28A.02.050 (prohibiting discrimination by

Against this historical backdrop, in early 1977, the Seattle School Board established certain criteria by which it was thereafter to be determined whether or not a given school within the Seattle School District was "racially imbalanced." Racial imbalance was defined, by board resolution, as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment * * * of no school will exceed 50 percent of the student body." (Exhibit 9)[6]

Having adopted this standard, the board then set about implementing a mandatory bussing program which would ultimately eliminate any racial distribution of students in Seattle schools which did not conform thereto. (Exhibits 7, 10-20) It held a series of hearings on the proposed program during which parents of public school students—both majority and minority—expressed repeated opposition and urged the board, instead, to preserve neighborhood schools (Transcript pp. 145-47). Local press accounts at that time indicated that roughly two-thirds of minorities polled in the Seattle area opposed a mandatory bussing program. (Exhibit A-137)

When the final version of the program was settled upon and scheduled to take effect at the beginning of the

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any school district in employment); RCW 35.80.040 and RCW 35.81.170 (prohibiting discrimination in "urban renewal" projects); RCW 41.14.180 (prohibiting discrimination in appointments and promotions in county sheriff's offices); RCW 43.01.100 (prohibiting questions relative to any applicant's race on any application for employment in state government); chapter 49.04 RCW (providing for affirmative action improving minority race representation in trade apprenticeships). RCW 49.60.176 (prohibiting racial discrimination in credit transactions); RCW 49.60.178 (prohibiting racial discrimination in insurance transactions); RCW 49.60.180 (prohibiting racial discrimination in labor union practices); RCW 49.60.200 (prohibiting racial discrimination in employment agency practices); RCW 49.60.215 (prohibiting racial discrimination in amusement); and RCW 49.60.222 (prohibiting racial discrimination in real estate transactions).

[6]Nothing in the record indicates that this particular formula is educationally more beneficial than the myriad of others which might have been chosen.

1978-79 school year, opponents attempted, without success, to seek relief from the state courts. (Findings of Fact 7.1, 7.2.) When they failed in that effort, they took the only course remaining open to them. They drafted, properly filed and thereafter campaigned for adoption of Initiative 350 at the November, 1978 General Election.

This time they succeeded and the initiative was approved by the voters in each of the state's 39 counties. The Seattle School District, joined by the Tacoma and Pasco School Districts, then commenced this litigation.

On February 9, 1979, after hearing, the district court entered a preliminary injunction and, at the same time, allowed intervention by parties. The complaints in intervention alleged that, regardless of whether Initiative 350 were otherwise constitutional, it could not be applied to the Seattle School District, in particular, since that district had committed past acts of *de jure* segregation. The district court ordered that the constitutionality of the initiative (*i.e.*, on its face or as applied generally) would be taken up first ("Phase I"). It further directed that "Phase II" of the proceedings, if necessary, would be addressed to whether or not Initiative 350 could constitutionally be applied in any given case.

Trial of the so-called "Phase I" issues was held in late April and early May, 1979. On June 15, 1979, the court entered findings of fact and conclusions of law accompanied by a memorandum opinion. (App. A) Entry of judgment was delayed pending disposition of requests for awards of attorneys' fees. On August 29, 1979, the district court entered its final declaratory judgment, stating, in part, as follows:

> 1. *Declaratory Judgment.* Initiative 350 is declared unconstitutional in that it denies equal protection of the laws to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:
>
> (a) It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unre-

lated to race. No compelling state interest justifies that racial classification.

(b) A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative.

(c) It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation. [CR 440.]

A Ninth Circuit panel majority affirmed the District Court, though on a limited basis, saying at 633 F.2d 1342-43:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson,* * * * *Lee v. Nyquist,* * * *"

Mention should also be made at this point of a previous action commenced by the Seattle School District in December, 1975.[7] That litigation resulted, in 1977, in a major restructuring of the traditional relationship between the State and its public school districts by sharply increasing the level of state funding for the districts and virtually eliminating local school district autonomy.[8] See the discussion at pp 15, 16, *infra*.

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[7]See, *Seattle School District v. State,* 90 Wn.2d 476, 585 P.2d 71 (1978).

[8]See, Laws of 1977, 1st Ex. Sess. (Basic Education Act of 1977); chapter 325, Laws of 1977, 1st Ex. Sess. (Levy Limit Act); and §§ 94, 96 and 97, chapter 339, Laws of 1977, 1st Ex. Sess. (Budget Act.) These legislative changes were in response to the trial court's decision in 1977 (affirmed by the State Supreme Court the following year) holding that Article IX of the Washington State Constitution makes it the paramount duty of the state (and not local school districts) to provide for the basic education of Washington's children. The amount of funding each school district is to receive not only from State, but from local sources as well, is now controlled by the state legislature. The legislature effectively controls average salary levels, the amount of permissible salary increases for school staff and staff/student ratios. Further, course offerings, in terms

3. The Impact of Initiative 350:

The courts below subscribed to the notion that Initiative 350, if implemented on a statewide basis, would have severe and sweeping adverse impacts on the exercise of constitutional freedoms in the field of public education. In so doing, they ignored the initial, self-evident proposition that Initiative 350 would have no impact on anyone in particular in those 297 Washington school districts where few, if any, extra-neighborhood assignments are presently being made for any purpose.[9] Moreover, as to the three plaintiff school districts represented in this appeal, it remains impossible to define and articulate any measurable adverse impact which justifies the lower court's acquiescence in this contention.

A. *Pasco.*

The impact of Initiative 350 when implemented in the Pasco School District, for instance, will be entirely salutary. The initiative will effectively eliminate invidious racial discrimination which has occurred and which continues to occur in that district.

The Pasco School District now has a racially-discriminatory one-way bussing program which it implemented in 1965 by closing its one predominantly black elementary school and bussing unwilling minority students from the so-called East Pasco area of the district to other schools located far from this neighborhood. (Findings of Fact 4.1-4.5; Transcript pp. 601-03.) In this respect, the Pasco bussing program is no different from that found to constitute a violation of equal protection in *NAACP v.*

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of both content and number of hours for various grade levels, are legislatively mandated, as is also the number of hours the teacher must spend in the classroom.

[9]See, Exhibit A-53; Exhibit A-93; Exhibit A-96. Many of these school districts have only one school facility serving students at a given grade level. Exhibit A-93. In fact, however, several larger school districts with minority populations in excess of the state-wide average have racially-balanced their schools through application of the traditional neighborhood school assignment policy. These districts would not be impacted by Initiative 350. See, Exhibit A-93(g) for school-by-school minority enrollments in the following school districts: Prosser, Grandview, Sunnyside, Toppenish, Wapato, Moses Lake, Quincy, Othello and Clover Park.

Lansing, 559 F.2d 1042, 1052 (6th Cir., 1977). But Initiative 350 would put an immediate stop to this discriminatory program by implementing its central neighborhood school assignment policy on behalf of *all* students and their parents—majority and minority—in the Pasco School District.

B. *Tacoma.*

In one sense, at least, the posture of the Tacoma School District here is like that of the Pasco School District—in that the reason for its presence at all in the litigation remains somewhat mysterious.

The Tacoma School District has no mandatory bussing. Instead, it operates a highly successful voluntary "magnet school" program by which it maintains racial balance in its schools. (Findings of Fact 5.1-5.16.) Though the district has contended half-heartedly during the course of this litigation that Initiative 350 will adversely impact its magnet school program it has never countered the State's responsive argument that Initiative 350 does not (and was never intended to) interfere with the program in Tacoma. The District Court nevertheless concluded, without analysis or explanation, that Initiative 350 would have some sort of adverse impact on the Tacoma program. (See, Finding of Fact 10.1.) The Ninth Circuit panel never reached the issue.

C. *Seattle.*

Only in the Seattle School District does Initiative 350 inhibit a local school district program to cure perceived racial imbalance in public schools. The evidence in this case suggests strongly, though, that minority parents in Seattle regard racially-oriented mandatory bussing as an intolerable burden. When viewed in this light, Initiative 350 has a racially benign impact. See, discussion at pp 18, 19, *infra*.

4. Record Identification of the Questions Presented.

Questions I through IV, and Question VI were effectively raised to the District Court in written briefs and oral argument at the time of hearing on Plaintiffs' Motion for Preliminary Injunction (February 9, 1979) and then

again at the time of trial (April 23-30, 1979; May 1, 10-11, 1979) and ensuing final argument (June 15, 1979). The District Court's disposition is reflected in its Findings, Conclusions and Memorandum Opinion (Appendix A).

Questions V and VII, first formally raised on appeal to the Ninth Circuit in Appellants' opening brief dated November 20, 1979, are based upon contentions of the State raised throughout the District Court proceedings. Though raised again on appeal, Questions I, II, IV, V, VI and VII were never reached by the Ninth Circuit, which effectively answered Question III affirmatively and found it unnecessary to deal with the other questions presented. See 633 F.2d at 1342-43.

Question VIII was first effectively raised by the petitions for award of attorneys' fees filed by respondents (plaintiffs below), which were denied by the District Court. The cross-appeals from that denial were disposed of in the manner shown at 633 F.2d at pp 1347-50.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Whether a Neighborhood School Policy May Be Restored, By Either the Legislative Authority of the State or By the School District Itself, Without Violation of the Fourteenth Amendment is a Significant Issue of Nationwide Importance. (Questions I-V.)

The State of Washington has operated a unitary public school system since territorial days—a system in which not one of its 300 local school districts has ever been found by any court to have committed a single act of intentional racial discrimination in the operation of its schools.[10] Yet the state has now been held to be constitutionally prohibited from statutorily formalizing its traditional, racially-neutral, neighborhood school assignment policy. A majority of the judges in the courts below so held, focusing upon the central fact that Washington's

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[10]In one instance, however, a finding of such discrimination appears to be warranted. See our discussion of Pasco School District, p. 8, *supra*.

largest school district, though under no constitutional duty to do so, has undertaken to achieve wider racial distribution of its students by using a forced bussing program which is inconsistent with the historical state policy in favor of neighborhood school assignment.

It is this traditional policy, legislatively reaffirmed through the passage of Initiative 350 by a substantial majority of voters in that district as well as by a majority of voters all across the state, which has been frustrated by the decisions rendered below.

The fundamental legal basis for this appeal is that, in so holding, the District Court and two members of a three-judge panel of the Court of Appeals have utterly disregarded the now well-established rule that state action—including enactment of a statute—may only be held violative of the Fourteenth Amendment to the United States Constitution when those challenging it have proven that it was motivated by an intent and purpose to discriminate on forbidden grounds. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

For the courts below, however, the fact that Initiative 350 was prompted by adoption of the Seattle Plan, and would effectively rescind a major part of that plan, was sufficient to invalidate the initiative. As stated by the Court of Appeals:

> "We note at the outset the operative legal and political effect of Initiative 350. As the District Court below said, the statute 'was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments.' 473 F. Supp. at 1015" 633 F.2d at 1343.

The legal theory adopted by the courts below will be examined shortly. Our purpose here is to show its important consequences.

Let us assume that the board of the Seattle School District were itself to decide to eliminate the Seattle Plan.

Would that action automatically be a violation of the Fourteenth Amendment? *Dayton Board of Education v. Brinkman*, 433 U.S. 40 (1977) certainly indicates that it would not. See p. i, *supra*.[11]

But *why* not? The decision to adopt the plan in the first place—though not constitutionally required—was certainly taken with full consciousness that racial matters were involved.[12] And the same must be equally true of *any* decision to eliminate the plan. Indeed, it would also be true of any decision to curtail any "affirmative action" program, whether it involves employment practices, admissions' policies to universities, or minority contractor preferences.

If the local board may *not* eliminate such a plan, and if the plan is therefor to be forever locked into place, it is important to have this Court state why and how the Fourteenth Amendment requires that result, contrary to the suggestion in *Dayton*.

If, on the other hand, the local board may eliminate such a plan it is equally important to find out why the Fourteenth Amendment prohibits the superior legislative authority of the State, itself, from achieving the same result.

To look at the matter from a slightly different perspective: One of the most important social and political issues in this nation today is that of mandatory bussing to achieve racial balance. Some even question whether it should be utilized as a remedy for *de jure* segregation—though the Washington voters, in adopting Initiative 350, certainly did not question that.[13]

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[11]As *Washington, Arlington Heights* and *Feeney* show, motivation and intent are critical. If the school district eliminated the plan simply because majority parents did not want their children in the same classrooms as minority children, and prevailed upon the board to accede to their wishes, the elimination of the plan would be constitutionally impermissible, under those decisions.

[12]The intervenor-plaintiffs, of course, claim that the district has committed acts of de jure segregation. The District Court has accordingly bifurcated this case, in order to hear that claim in a subsequent phase. See, page 6, *supra*. As we have already noted, however, Initiative 350 does not prevent *constitutionally required* bussing. See, page 4, *supra*.

Yet, the lower courts have effectively put this entire issue of bussing to achieve racial balance outside the scope of permissible action by the voters—even when no *de jure* segregation is involved in the first place. The voters can debate the issue all they wish; but neither they nor their elected representatives can decide it. According to the lower court decisions, the Fourteenth Amendment has taken this power from them.[14]

We next briefly review how the lower courts arrived at this astonishing result.

A. *The Holding of The Court of Appeals that Initiative 350 Creates a Racial Classification, Thereby Obviating Any Inquiry Into Intent, Represents a Shift in Equal Protection Analyis Which Should be Reviewed by this Court.*

Both the District Court and the Court of Appeals concluded that Initiative 350 was unconstitutional under *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y., 1970), aff'd 402 U.S. 935 (1971). Those decisions struck down explicit racial classifications (though expressed in neutral terms) contained in state legislation. Here, however, the courts below applied a loose, process-of-elimination analysis to reach the

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[13]Initiative 350 unquestionably embodies, however, a profound skepticism about the net benefits to be gained from any generalized mandatory bussing program, such as Seattle's, when that program is constitutionally unnecessary. For the initiative allows such bussing only when it can be justified on the basis of (1) the specific educational needs of a specific student; (2) specific health or safety hazards or physical barriers between a student's home and his neighborhood school; or (3) physical deficiencies in that neighborhood school. See, § 1(1)-(3), quoted at page 3, *supra*.

[14]In California, however, the voters still have this power of decision. They exercised it in the November, 1979 general election by adopting Proposition 1, a constitutional amendment which prohibited state courts from ordering mandatory bussing for racial balance, except when required by the Fourteenth Amendment. See *Crawford v. Board of Education of the City of Los Angeles*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), review denied by California Supreme Court, March 11, 1981, upholding the validity of Proposition 1 against a Fourteenth Amendment challenge essentially the same as that presented in this case. As a result, the mandatory bussing program in Los Angeles has been dismantled, while that in Seattle remains constitutionally locked in.

conclusion that *Hunter* and *Lee* are controlling. The Court of Appeals stated its approach succinctly at 633 F.2d 1342-43:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose * * * We conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson*, * * * *Lee v. Nyquist*, * * *"

We agree with the District Court that

> "* * * [a] although the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. * * *"

How this basic approach—finding a racial classification in a statute which makes no reference to race—amounts to a major shift in equal protection analysis is shown by the dissenting opinion:

> "In its recent decisions, the Supreme Court has emphasized that the touchstone of an equal protection violation is an *intent to discriminate*, i.e., an intent to treat similarly situated persons differently." 633 F.2d 1351. (Emphasis supplied)

That opinion then shows how this "touchstone" has been established and applied in *Washington*, *Arlington Heights* and in recent school desegregation cases such as *Dayton* and *Columbus Board of Education v. Penick*, 433 U.S. 449 (1979).

The dissent then continues:

> "The inquiry into intent can be avoided only if the challenged statute contains an explicit suspect classification: * * * [quoting from *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)]" 633 F.2d at 1351.

And finally, the opinion pinpoints the fundamental

error in the majority's approach:

> "The laborious inquiry into intent, see *Columbus* and *Dayton, supra*, could be avoided under the majority's analysis by simply finding an explicit racial classification any time a school district bused students for special education or other reasons, while refusing to do so to desegregate its schools." 633 F.2d at 1352.

And again,

> "The difficulty with the majority's analysis, supported in part by dictum in *Lee v. Nyquist*, * * * is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But 'racial' problems, such as school desegregation, must be dealt with in terms of the specific problem and specific solutions. The state does not create a classification on the basis of race in so doing." 633 F.2d at 1353.

That a statute does not create a racial classification does not, of course, automatically save it from constitutional challenge; it simply means that the issue of discriminatory intent must be examined and resolved.

Two final points on this question. *Lee* and *Hunter* are applications of the basic principle that a governmental body may not "stack the political deck" against a minority in attaining adoption of laws that are in its interest. And the majority below obviously thought that Initiative 350 had done exactly that, by improperly removing the issue of mandatory bussing for racial balance from the hands of the local school boards. See, 633 F.2d at 1345-46.

As the dissenting opinion points out, however, that is simply not the case. Under Article IX, § 1 of the Washington Constitution, as applied in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), it is the *state* which has the responsibility "for organization, administration and operational details of elementary and secondary education." 633 F.2d at 1353. And the state has fully met that responsibility, and thereby eliminated any significant autonomy of local school boards. See, page 7, *supra*.

Under Initiative 350 the proponents of mandatory bussing must convince either the state legislature or the

voters of their cause. But in this, they are in no different situation from the proponents of any other significant proposal affecting the operation of public schools in the State of Washington.

Secondly, the approach taken by the Court of Appeals is strikingly similar to that taken by the three-judge District Court in *Valtierra v. Housing Authority of San Jose*, 313 F.Supp. 1 (1970), in which the District Court struck down an amendment to the California Constitution providing that no low rent housing projects could be developed unless the project was approved by the voters of the community. The District Court stated:

> In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the [plaintiffs in the companion case] assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protection clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." Hunter v. Erickson, *supra*, 393 U.S. at 391. * * *
>
> * * * *
>
> Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities. The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. 313 F.Supp. at 4-5.

In reversing the judgment of the three-judge court this Court said, in *James v. Valtierra*, 402 U.S. 137, 140-41 (1971):

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental

process." Id. * * * *

> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." * * * * The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. * * * * The present case could be affirmed only by extending Hunter, and this we decline to do.

Like the district court in *Valtierra*, the lower courts in this case have examined a statute which was racially neutral on its face and determined that a racial classification was necessarily implied. They then presumed that this implied classification was constitutionally invalid, and ended the analysis right there. No consideration of intent was needed. By extending *Hunter* and avoiding the required inquiry into intent, the lower courts have effected a major shift in equal protection analysis.

Under the *Washington* line of cases, however, the proper analysis is to determine whether such a racially-neutral statute, though it affects racial minorities, was adopted with a discriminatory intent.

We turn next to what should have been, but was not, the most important question for the Court of Appeals—the question of intent.

B. *The Definition of the Proper Criteria for Determining Illicit Discriminatory Intent in an Initiative or Referendum Approved by the Voters of a State Presents an Important Question Which Should be Resolved by This Court.*

The District Court, unlike the Court of Appeals, did inquire into intent—barely. It declined, for example, to delve into the subjective intent of the voters on the basis that "* * * the secret ballot raises an inpenetrable barrier." 437 F.Supp. at 1014. And thus did the secrecy of the ballot box make the whole balloting process a worthless exercise; for the State was thereby precluded from showing the validity of what the voters adopted.

The admitted evidence which was thus categorically excluded from consideration included several studies and public opinion surveys. One of these, a nationwide survey of racial attitudes, conducted by the Lou Harris Organization, demonstrates a genuine lack of segregative intent by members of the white majority—an attitude particularly strong in the American West—coupled with sincere opposition to mandatory assignment of public school students to achieve racial balance. (Exhibit A-133, pp. 13-14, 42, 43.) The same study shows that, on a nationwide basis, a plurality of black Americans now oppose mandatory bussing as a desegregation remedy. (Exhibit A-133, page 37.)

On the other hand, local school district studies placed into evidence indicated that over 70 percent of Seattle residents polled actually expressed a preference for living in multi-racial neighborhoods. (Exhibit A-97.) And again, the most widely read newspaper in the state, the Seattle Times, informed the electorate in early 1978 that, according to its own poll, roughly two-thirds of minority parents and guardians opposed imposition of mandatory bussing for the purpose of alleviating racial imbalance in schools. (Exhibit A-127.) News articles which appeared in both major daily newspapers in the city of Spokane, Washington's second largest city, just prior to the 1978 General Election contained reports of parental opposition to "bussing" entirely unrelated to race. (Exhibit A-130.) Advertising and public relations witnesses called by both sides gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would lose support in Washington if designed to appeal to segregative and racist attitudes. (Tr., pp. 496-98, 505-06, 509-11, 538; Ex. 2.)

Principal witnesses on behalf of all three plaintiff school districts acknowledged that a vast majority of parents—both minority and majority parents—in those districts expressed preference for retention of the time-honored neighborhood school assignment policy. (Tr., pp. 145-57, 391, 601-02, 605, 634-38.) All of this evidence was apparently ignored by the District Court which, instead, resorted to an *ipso facto* analysis to reach its conclusion that a segregative purpose must have motivated the passage

of Initiative 350, keying upon the singular proposition that the measure was adopted in direct response to implementation of the Seattle School District's bussing program. 437 F.Supp. 1014-16.

By categorically excluding such evidence (and more) from consideration, the District Court effectively refused to consider the State's factual defense that passage of Initiative 350 was *not* motivated by an intent to discriminate on racial grounds.[15] It is difficult enough for any defendant to prove a negative proposition; but that task was rendered flatly impossible here when the District Court refused to face the necessary task described in *Dayton Board of Education v. Brinkman, supra,* at 433 U.S. 414:

> "We realize, of course, that the task of fact finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, *cf. Arlington Heights v. Metropolitan Housing Development Corp.*, * * *"

Initiative 350 is not the first law adopted by the voters of a state or political subdivision which has racial implications. Nor will it be the last. The question of the proper evidence for determining the voters' intent is important and merits review by this Court.

II. Because Initiative 350 Reflects the National Neighborhood School Policy Adopted By Congress, the Lower Courts' Decisions Here Must Be Reconciled With Other Circuit Court Decisions Which Validate That Congressional Policy. (Questions VI, VII)

Initiative 350 is patterned very closely after certain provisions of federal law—the Equal Educational Opportunities Act of 1974 (codified as 20 U.S.C. § 1701, *et seq.*). See, Finding of Fact 7.6 473 F. Supp. 1008. The basic policy of that act is as follows:

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[15]Space considerations prevent us from fully reviewing here all of the evidence proffered on this issue. See, however, State Defendant's Proposed Findings of Fact and Conclusions of Law (Pleading No. 378, according to the Clerk's Record.)

Congressional declarations of policy.

(a) "1701 The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments."

Congress has reinforced this substantive expression of national policy by expressly limiting the geographical extent of any federally-ordered busing of school children to precisely the same geographical extent as does Initiative 350:

"1714. * * *

(a) No court, department, or agency of the United States shall * * * order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

Although the foregoing statute has been scrutinized on a number of occasions, it remains intact as an expression of congressional policy in favor of a nationwide neighborhood school policy and a substantive limitation on federal administrative involvement in busing for desgregation purposes. See, *e.g.*, *Hart v. Community School Board*, 512 F.2d 37 (2d Cir. 1975), *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975), cert. den., 96 S.Ct. 566, 423 U.S. 1034, 46 L.Ed.2d 408; *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir. 1975), cert. den., 423 U.S. 1000; *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

The incongruity in according different judicial treatment to these two parallel legislative efforts—one state and one federal—raises an obvious and substantial federal question. For if Congress may enact legislation of this type without violating the due process clause of the Fifth Amendment to the United States Constitution, how can it be said that the State of Washington violates the Equal

Protection Clause of the Fourteenth Amendment by seeking to achieve the same goal by using the same statutory formula? *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

The treatment accorded this federal statute by the federal courts differs from the treatment accorded Initiative 350 in one other respect, as well. The District Court held the initiative to be overbroad, on the ground that it would prohibit a school district from eliminating even *de jure* segregation, if the district thought it existed, though a court had not yet so ruled that it existed. See 473 F.Supp. at 1016.

Not only did that analysis of the District Court conflict with the legislative history of Initiative 350 (see, *e.g.*, Exhibit 39, Appendix 65) and the official interpretation of it by those state officials charged with implementing the measure, it also failed to account for the long-familiar rule that legislation will, if at all possible, be interpreted as restricted in scope if such an interpretation will preserve its constitutionality, even in the absence of language expressly so limiting the statute's impact. *United States v. Raines*, 362 U.S. 17 (1960); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

Even more importantly, the District Court's treatment of this issue is inconsistent with the treatment accorded the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701 et seq.) by the federal courts. See, *e.g.*, the treatment of 20 U.S.C. § 1702(b) in *Brinkman v. Gilligan*, 518 F.2d 853 (1975), cert. den. 423 U.S. 1000 (1975) and *Morgan v. Kerrigan*, 530 F.2d 401 (1976), cert. den. 426 U.S. 935 (1976).

III. The Ninth Circuit Panel's Reversal of the District Court's Denial of Attorney's Fees Raises Substantial Questions About the Limits to Which the Civil Rights Attorneys' Fees Statutes May Be Applied. (Question VIII)

The Court of Appeals concluded that the trial court had abused its discretion in refusing to award attorneys' fees to the school districts. In fact, the panel majority actually substituted its discretion for that of the District

Court and concluded that it was unreasonable *not* to award fees to a school district created, controlled, and funded by the defendant.

We will here note briefly the legal, factual and policy reasons why the Court of Appeals erred, and why this question requires plenary consideration by this Court.

(a) **Factual:**

The trial court recognized that this litigation had already been, and continues to be, largely funded by money appropriated for the school districts by the defendant state for purposes which include the conduct of this litigation. The Court of Appeals, however, concluded that refusing to require the state to reimburse the school districts for their expenditure of *State* funds, enabling them to sue the *state*, was an abuse of discretion! Is "double dipping" to be encouraged as a matter of fundamental national policy? Did Congress *intend* that result? Is that result necessary in order to encourage enforcement of the civil rights laws?

(b) **Legal:**

By awarding fees to the school districts, the Court below has, in effect, appropriated funds from the state treasury in favor of a municipal corporation of the state, created, funded and controlled by the state, and deriving its existence and authority entirely from state law. It has, inescapably, made a decision with respect to the appropriate funding of state programs and the establishment of state legislative priorities.

The Court of Appeals cited no authority for the proposition that municipal corporations—as creatures of statute—are even with the ambit of 42 U.S.C. 1988 or 20 U.S.C. 3205 so that they may, in this manner, demand additional public funds to replace those already furnished to them by the state legislature. Whether Congress ever intended, or even envisioned, such a result is extremely doubtful. In connection with the passage of 42 U.S.C. § 1988, for example, the Senate Report which accompanied the bill stated, in part, as follows:

"All of the civil rights laws depend heavily upon

> *private* enforcement, and fee awards have proved an essential remedy if *private citizens* are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, *the citizen* who must sue to enforce the law has little or no money with which to hire a lawyer. If *private citizens* are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then *citizens* must have the opportunity to recover what it costs them to vindicate these rights in court." [1976 U.S. Code Cong. & Admin. News at page 5908.] [Emphasis supplied.]

The legislative policy in favor of subsidizing *private* litigants has uniformly been reaffirmed by the courts. The case most often cited in support of this general expression of Congressional policy is *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), decided before either of the statutes here involved was enacted.

The essence of this Court's reasoning was stated at 390 U.S. 402:

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, *to encourage individuals injured by racial discrimination* to seek judicial relief under Title II." (Emphasis supplied)

The so-called "private attorney general" rationale for awards of attorneys' fees makes no sense in the present context. The original plaintiffs here were school districts—political subdivisions of the state, the operations of which are entirely publicly funded—not private citizens acting as "private attorneys general." That term itself connotes belief on the part of the courts that, when matters are finally settled and it is the private plaintiffs who have prevailed, it is appropriate that the public treasury should be tapped to pay for litigation found to have been commenced in the public interest. But that is precisely

what has happened here already. The language in the foregoing excerpts expressing concern about the "cost of private enforcement" has no application whatsoever in the situation where, as here, state-funded municipal corporations themselves seek the relief.

To summarize then, it seems amply clear that the Congressional purpose in enacting the various civil rights attorneys' fees statutes would not at all be served by allowing the school districts to replenish public funds already given them by the state for this very purpose.

C. **Policy:**

If Court of Appeals view prevails, it may well be counterproductive. States are today facing what can honestly be described as a fiscal crisis. The courts cannot fail to recognize this reality. Intense competition exists among worthwhile and important public programs for the use of increasingly scarce public dollars. The result of awards such as that of the Court below in this case may indeed be the withdrawal by the states of "legal services" funds from their subordinate public bodies and *other* publicly funded agencies; such as legal services organizations. To avoid the fiscal drain of "double dipping," state legislatures may choose to require those heretofore state-funded agencies to support their legal services efforts entirely—or at least in significant part—from other sources. The fundamental purpose of the civil rights attorneys' fee statutes will thus not be fostered, but rather inhibited. Is that sound public policy? Unless this Court notes probable jurisdiction and reverses, sound or not, policy it will be.

CONCLUSION

By failing to properly apply the decisions of this Court, the courts below have overridden the decision of the voters of the State of Washington on an important policy issue of national concern. The grounds on which they did so are also of national concern. Accordingly, this Court should note probable jurisdiction.

Dated this 16th day of June, 1981.

Respectfully submitted,

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APPENDIX A

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a Municipal Corporation, et al., Plaintiffs,

and

American Civil Liberties Union et al.,
Intervenor Plaintiffs,

v.

The STATE of Washington et al.,
Defendants

and

Citizens for Voluntary Integration
Committee (Ci.V.I.C.) et al.,
Intervenor Defendants.

No. C78-753V.

United States District Court,
W. D. Washington.

June 15, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

VOORHEES, District Judge.

Based upon the complete record in this case, including testimony and evidence introduced at the trial in this matter, the Court makes the following:

FINDINGS OF FACT

1. *Parties*

1.1 Plaintiff Seattle School District No. 1 of King County, Washington (sometimes called "Seattle" or the "District" herein) is under Revised Code of Washington

Title 28A ("RCW 28A") a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" (An.Const. art. IX, §§ 1 and 2) for the educational instruction of the approximately 54,000 common school students, of whom 37.3 percent are racial minorities according to current federal reporting categories, in kindergarten and grades 1 through 12. There are approximately 112 schools in Seattle, which is the largest public school district in the State of Washington, the boundaries of which are substantially coterminous with the boundaries of the City of Seattle, King County, Washington.

1.2 Plaintiff Tacoma School District No. 10 of Pierce County, Washington (sometimes "Tacoma" herein) is under RCW 28A a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" for the educational instruction of the approximately 29,000 common school students, of whom 20 percent are racial minorities according to current federal reporting categories, in kindergarten and grades 1 through 12. There are approximately 57 schools in Tacoma, which includes the City of Tacoma, the incorporated towns of Fircrest and Ruston and the unincorporated areas of Hunt's Prairie, Dash Point and Brown's Point which are substantially coterminous with the boundaries of the City of Tacoma, Pierce County, Washington.

1.3 Plaintiff Pasco School District No. 1 of Franklin County, Washington (sometimes "Pasco" herein) is under RCW 28A a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" for the educational instruction of the approximately 5,300 common school students, of whom 26.5 percent are racial minorities according to current

federal reporting categories, in kindergarten and grades 1 through 12. There are approximately ten schools in the Pasco School District, which includes the City of Pasco and the contiguous unincorporated areas of south Franklin County, Washington.

1.4 Plaintiff Board of Directors of Seattle School District No. 1 (sometimes the "Board" herein) is composed of seven publicly elected members. The Board commits itself and adopts policy by a majority vote of its members. It is the statutorily constituted legislative, adjudicative, and administrative governing body of the District and is responsible for operating and setting administrative and educational policy for the District. All plaintiff Board members have taken as a prior condition of assuming their public duties the following oath of office:

> I do solemnly swear that I will faithfully and impartially perform the duties of Director, Seattle School District No. 1 as prescribed by law and to the best of my ability, and that I will support and maintain the Constitution of the State of Washington and the United States. So help me God.

1.5 As indicated in the caption to this document plaintiffs Sutton, Alexander, Bleakney, Olson, Hollingsworth and Hittman are members of the Seattle School Board whose identified children are attending school in Seattle. They have been declared guardians ad litem for those children by Order of this Court.

1.6 Plaintiffs Vassar, Annie Jones, Wasserman, Davis, Andrews, Tangalin, Santos, Marr, Joe and Mona Jones, Charles, and Taupule are parents of children, identified in the caption to this document, who are attending school in Seattle. They have been declared guardians ad litem for those children by the Order of this Court.

1.7 The individual plaintiff students represent the diverse racial and ethnic mix of students in Seattle.

1.8 Intervenor plaintiff American Civil Liberties Union of Washington (ACLU of Washington) is the Washington State affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization

dedicated to the promotion and protection of the civil rights and liberties of all persons.

1.9 Intervenor plaintiff American Friends Service Committee (AFSC) is an international social change organization related to the Society of Friends (Quakers). Among the AFSC's basic goals is the protection and promotion of the civil rights and liberties of all persons.

1.10 Intervenor plaintiff Church Council of Greater Seattle is an ecumenical organization established in 1969 to provide a structure within which 22 church denominations (local congregations, and church-related entities, Protestant and Catholic, in the Metropolitan Seattle Area) can work cooperatively.

1.11 Intervenor plaintiff Loren Miller Bar Association, a Washington nonprofit corporation, is comprised of approximately 45 lawyers admitted to practice in one or more states of the United States. It is an affiliate of the National Bar Association, comprised of lawyers of minority races. The Loren Miller Bar Association was organized statewide in the mid-1960's, having as a primary purpose the provision of legal assistance to minority persons in cases involving deprivation of civil rights and liberties.

1.12 Intervenor plaintiff Seattle Branch, National Association for the Advancement of Colored People (Seattle Branch, NAACP) is the local affiliate of the NAACP. Throughout its 60 year existence, the NAACP has had as a primary purpose the achievement of quality integrated education for all persons regardless of race.

1.13 Intervenor plaintiff Seattle Chapter of the American Jewish Committee is the local branch of a national organization founded in 1906 with stated purposes of resisting and eliminating racism, bigotry and anti-Semitism.

1.14 Intervenor Plaintiff Seattle Urban League is a local affiliate of the National Urban League, a nationwide, nonprofit, nonpartisan organization dedicated to equal opportunity and racial justice.

1.15 Each of the intervenor plaintiff organizations described in paragraphs 1.8 through 1.14 above has members or constituents whose minor children attend the

Seattle schools, and each intervenor plaintiff sues on its own behalf and on behalf of such members and their children.

1.16 The individual intervenor plaintiffs named in the caption to this document are taxpayers residing within the boundaries of Seattle and are parents of minor children, named in the caption to this document, who attend public schools in Seattle. These individual plaintiffs are black, white, Chicano, and Asian-American citizens of the United States who bring this action each on their own behalf and on behalf of their minor children, for whom they have been appointed guardians ad litem by Order of this Court.

1.17 The rights of the members or constituents of the above intervenor plaintiff organizations and other persons to equal protection of the laws is germane to the organizational purposes of the intervenor plaintiff organizations.

1.18 Additional intervening plaintiff East Pasco Neighborhood Council is a nonprofit corporation organized under the laws of the State of Washington in 1971. The East Pasco Neighborhood Council is primarily composed of minority individuals and families. The general membership resides in an area known as "East Pasco." East Pasco is an area which has been physically segregated from the business area and majority population of Pasco by the tracks of the Northern Pacific Railroad. These railroad tracks were constructed in approximately 1943.

1.19 The individual additional intervening plaintiffs named in the caption are all residents of East Pasco. Each of these individual intervening plaintiffs is a racial minority in Pasco, and each is a parent or guardian ad litem, as identified in the caption, for a student of the Pasco School District No. 1 of Franklin County, Washington.

1.20 Additional intervenor plaintiff the United States of America has statutory authority under Section 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, to participate in actions, such as the present matter, involving alleged denial of equal protection of the laws. The Attorney General has certified that this case is of general public importance.

1.21 Defendant the State of Washington is one of the fifty United States of America.

1.22 Defendant Dixy Lee Ray is Governor of the State of Washington.

1.23 Defendants John Bagnariol and Duane L. Berentson are the principal officers of the Washington State House of Representatives. Defendant John A. Cherberg is the principal officer of the Washington State Senate.

1.24 Defendant Slade Gorton is Attorney General of the State of Washington.

1.25 Defendant Frank B. Brouillet is Washington State Superintendent of Public Instruction.

1.26 Defendants H. Eugene Hall, Levy S. Johnston, Jack L. Reid, Edward Diamond, Mark E. Hoehne, Roger H. Lincoln, Walter H. Lewis, James M. Spalding, Ollie Mae Wilson, Orville Barnes, Grant L. Anderson, Eileen B. Kalles, Philip B. Swain, and Robert B. Stookey are all of the members of the Washington State Board of Education.

1.27 Defendant Norman K. Maleng, Prosecuting Attorney of King County, Washington has been dismissed from these proceedings.

1.28 Intervenor defendant Citizens for Voluntary Integration Committee (CiVIC) is a Washington nonprofit corporation which was a drafter, sponsor, organizer, and campaigner for Initiative Measure No. 350, the subject matter of this lawsuit.

1.29 CiVIC was formed on or about December 28, 1977 with the stated purposes of opposing mandatory school assignments based on racial or ethnic identification, proposing affirmative programs of voluntary integration, and promoting quality education on an equal basis for all. A copy of the CiVIC Articles of Incorporation was filed with the Secretary of State of the State of Washington on or about January 16, 1978.

1.30 Intervenor defendants Peter and Sandra King, Dahley, Bates, Liddell and George and Sally King are parents of the children, identified in the caption, who attend school in Seattle.

2. *Tender to State; Rejection*

2.1 On November 28, 1978, original plaintiff individ-

uals and taxpayers formally tendered this action to the Attorney General of the State of Washington demanding that he promptly initiate and competently prosecute proper legal action to have Initiative 350 declared unconstitutional. The Attorney General declined plaintiffs' request to institute this action in his letter of December 19, 1978.

3. *General Facts and Historical Context; Segregation of Plaintiff School Districts; Failure of "Voluntary" Desegregation*

3.1 An educational system in which minority students are relatively segregated from white students provides an unequal and poorer education than a system in which the schools are racially balanced.

3.2 The three plaintiff school districts have had, and in some instances continue to have, racially imbalanced schools. The term "racial imbalance" in a school is used to mean a disproprotionately high minority enrollment in a particular school in relation to districtwide minority student population. The term "segregation" is used to mean, where indicated, racial separation in housing patterns.

3.3 In each of the plaintiff school districts, there are residential areas in which minority races are predominant.

3.4 The preponderance of minority families live in the central and the southeast quarter areas of the City of Seattle. Those Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live.

3.5 Residential segregation in Seattle and the proportion of minorities in the school system are such that elimination of racial imbalance in the public schools cannot be accomplished through "voluntary" desegregation strategies consistent with Initiative 350.

3.6 The segregation of housing by races in Seattle cannot be expected to change sufficiently to permit the racial balancing of public schools to be accomplished within the reasonably foreseeable future unless some students are assigned to schools other than their nearest or next nearest schools.

3.7 It is difficult to gauge the degree to which "racial bias" influences opinions about "busing." Nevertheless, racial bias or racial motivation is a factor in the opposition to the "busing" of students to attain racial balance.

3.8 Plaintiff school districts have for some time attempted to reduce or eliminate the racial imbalance existing in their schools. But for these efforts which direct or permit many students to attend schools other than their nearest or next nearest schools, there would be even greater racial imbalance in the schools of plaintiff school districts.

3.9 The closure of schools is not a practicable tool for racial balancing because there is such great and emotional opposition to the closure of schools.

3.10 The measures taken by the Seattle and Tacoma School District plaintiffs to balance their schools racially have met with both public opposition and public support. In the Seattle School District, the opposition has included several lawsuits and an unsuccessful recall election directed at school board members who in 1971 voted to implement a middle school desgregation program which included mandatory student assignments to non-"neighborhood" schools. The mandatory assignment feature of the middle school program was the most controversial part of the program and was the primary reason for the recall attempts.

3.11 On October 19, 1978, defendant State Board of Education adopted a policy statement, applicable to the State's common schools, condemning racial segregation in schools and urging the elimination of segregation from the State's public schools. On that same day, the State Board adopted a definition of racial isolation which was the same as that adopted by the Seattle School Board by its Resolution 1977-8.

3.12 At the commencement of the 1978-79 school year, there were 769,040 students enrolled in the public schools of this State. At time of trial approximately 300,000 students were being transported by bus to public schools in the State. Ninety-five percent of those students were being transported for reasons unrelated to school district

attempts to reduce or eliminate racial imbalance in the schools.

4. *Historical Background as to Pasco*

4.1 In 1943 the Energy and Research Development Administration, at that time known as the Manhattan Project, selected the Hanford site for the production of plutonium for the atomic bomb. The Pasco population in 1943 was predominantly white. Substantial numbers of blacks began to arrive in the Tri Cities to work on the Manhattan Project at Hanford. At that time Richland was a federal government-owned town and under rigid federal housing regulations which excluded blacks. Blacks were unable to find housing in Richland, Kennewick or certain areas of Pasco. The availability of homes for blacks was greater in east Pasco. Blacks and other minorities began to move into the east Pasco area, east of the railroad tracks.

4.2 With the phasing out of the Manhattan Project and the scaling down of the activities of the U.S. Atomic Energy Commission, many individuals stayed and sought whatever work was available. Black population in east Pasco continued to increase, and there began a trend of migration of whites to the west Pasco area. New schools in the Pasco School District ("Pasco") followed these population shifts. One original school, Whittier Elementary School, was left in east Pasco. The residential segregation in Pasco resulted in a racially imbalanced public school system.

4.3 In the spring of 1965 the Pasco School Board elected to close predominantly black Whittier Elementary School. The Board voluntarily adopted a systematic plan for equalizing pupil distribution by race throughout the Pasco School System. A pupil transportation scheme was developed to facilitate this, and attendance boundaries were changed. Only minority children have been bused in order to implement the Pasco plan. No white students have been transported to achieve racial balance.

4.4 East Pasco is between 92 and 97 percent minority.

4.5 The Pasco District has seven elementary schools.

Three would be predominantly white and three predominantly minority if students attended the school nearest to their homes. Current minority percentages in the elementary schools are as follows:

Mark Twain	15.7%
Longfellow	50.0%
Livingston	15.3%
Gray	38.9%
Robert Frost	31.6%
Emerson	44.8%
Markham	12.9%

5. *Historical Background as to Tacoma*

5.1 For over a decade the Tacoma School District has allowed students to attend schools other than those geographically closest to their homes for the purpose of preserving an appropriate racial balance in its schools. Through a program of both mandatory actions (school closures and racially controlled enrollment at magnet schools) and voluntary alternatives for students and parents (optional enrollment, busing, and counseling), the Tacoma School District has been able to lessen the racial imbalance in its schools. The Tacoma School District's definition of a racially imbalanced school is one that has a combined minority enrollment of 50 percent or more or a single minority of 40 percent or more. All student enrollment in the Tacoma School District is subject to the district's policy of maintaining a racially balanced school district.

5.2 In the early 1960's, Tacoma School District personnel and community leaders realized that housing patterns and other factors had led to relatively high concentrations of racial minorities at certain of the district's schools.

5.3 In July 1966, the Tacoma School Board adopted a voluntary optional enrollment policy for students attending McCarver Junior High School, a central area facility experiencing minority enrollment exceeding 50 percent of the school population. Students who resided in the attendance area for McCarver Junior High School were given the option to attend other junior high schools in the

district. In addition, students at other junior high schools were given an opportunity to attend McCarver Junior High School, provided that such attendance would reduce the racial imbalance existing at McCarver. The Tacoma School District provided special bus transportation for students participating in this optional enrollment program.

5.4 In June 1967 the voluntary optional enrollment program was expanded to include these central area elementary schools: McCarver, Stanley, Central and Bryant Elementary Schools. Students residing in the attendance areas for those schools were given the option to attend any elementary school in the Tacoma School District. In addition, optional enrollment opportunities were extended to students attending elementary schools outside the central area to attend the central area elementary schools if transfer into the schools would tend to reduce racial imbalance.

5.5 In October 1967 minority enrollment at McCarver Elementary, Stanley, and McCarver Junior High Schools was in excess of 50 percent of the total student population of those schools.

5.6 In April 1968 the Tacoma School Board adopted major changes designed to ease the perceived racial imbalance in Tacoma schools. The changes included:

a. Closure of McCarver Junior High School as a junior high school, and transfer of all junior high school students attending McCarver to junior high schools throughout the district;

b. Establishment of an exemplary elementary school ("magnet school") at the McCarver Junior High School facility, with admission open to students throughout the district by voluntary application only, and with student attendance controlled by the district to preserve an appropriate racial balance;

c. Closure of Central Elementary School;

d. Transfer of all sixth graders at Stanley Elementary School to other elementary schools throughout the district;

e. Reaffirmation of the district's position that no high school in the Tacoma School District would be allowed to become racially imbalanced.

5.7 Following this school district action, McCarver Elementary School went from an 87 percent black population in 1967 to a 53 percent black population in 1969.

5.8 In May 1970 the Tacoma School Board adopted policies specifically committing the district to the reduction of racial imbalance to levels within the State Board of Education guidelines, and establishing a technologically advanced elementary school ("magnet school") at Stanley Elementary, with an admission program similar to that existing at McCarver Elementary.

5.9 By September 1971 the elimination of board-defined racial imbalance at McCarver Elementary School has been completed.

5.10 By September 1972 no school in the Tacoma School District had minority enrollment in excess of 50 percent of total student enrollment except Hawthorne, which was closed as a school building in 1973-74.

5.11 In November 1972 the Tacoma School Board adopted a limited voluntary optional enrollment program for high school students, allowing high school students to attend, with certain qualifications, the schools of their choice.

5.12 In February 1974 the Tacoma School Board extended the voluntary optional enrollment program, with certain qualifications, to all grade levels throughout the district.

5.13 The Tacoma School District currently operates educationally enhanced (magnet school) programs at McCarver Elementary School and Stanley Elementary School. Both are located in the Tacoma central area. Those elementary schools are now operated as districtwide elementary schools with attendance selections made solely by application. Students are accepted in those schools in light of the number of student vacancies at the schools and in light of the racial balance at those schools.

5.14 As a part of the magnet school programs at McCarver and Stanley Elementary Schools, attendance at those schools is controlled by the Tacoma School District to maintain a racial balance within the district, state and federal guidelines. At the initiation of the Tacoma School

District magnet school program in 1968-1970 some students living in the geographic attendance areas immediately surrounding McCarver and Stanley were denied enrollment at those schools because their attendance would adversely affect the racial balance. Thus, students, and particularly black students, whose attendance would have disrupted the desired level of racial balance at Stanley and McCarver were assigned to other elementary schools throughout the Tacoma School District. At present, changes in housing patterns, optional enrollment, busing and counseling have permitted all students residing in McCarver Elementary School geographic attendance area to attend that school, if they wish, without creating a racially imbalanced school. However, at present, 70 students from the Stanley attendance area are denied admission to Stanley Elementary School.

5.15 The optional enrollment program operated by the Tacoma School District allows students to attend any school within the Tacoma School District, except the Stanley and McCarver Elementary Schools, whose attendance is controlled by the district through voluntary applications. To assist the students' and parents' decisions concerning optional enrollment, the district has operated an extensive summer counseling program to counsel parents and students concerning the availability of educational opportunities at schools other than those nearest the homes of the students.

5.16 Public transportation is an element of both the magnet school and the optional enrollment programs. Transportation is funded by the district, though transportation services are actually delivered by the Tacoma Transit System. Currently, approximately 1,394 students bus in and out of the Tacoma central area as a part of the magnet school program. Approximately 1,200 additional students annually participate in the optional enrollment program and many of those students use bus transportation to travel between their homes and schools. Of the approximately 1,394 students busing in and out of the Tacoma central area, approximately 444 are elementary school children who reside in geographic areas in which

either McCarver or Stanley is the nearest or next nearest elementary school. For most of these students, McCarver or Stanley is also their next-nearest school.

6. *Historical Background as to Seattle*

6.1 For many years the Seattle School District ("Seattle") has taken steps to end racial imbalance of its schools. These steps hve often been associated with significant public controversy. In addition to the present litigation, Seattle has been a party to several lawsuits and administrative proceedings relating to desegregation. Some are:

Campbell et al. v. Seattle School District No. 1, Cause No. 9171 before the United States District Court for the Western District of Washington (suit to require "an acceptable plan to achieve meaningful racial balance in the public schools throughout Seattle * * *" (Complaint, page 6) filed on or about August 28, 1970 and dismissed October 12, 1972);

State ex rel. Citizens Against Mandatory Bussing v. Brooks, ("CAMB I"), 80 Wash.2d 121, 492 P.2d 536 (1972) (concerning the sufficiency of a petition to recall School Board members who voted for a controversial multi-racial middle school and mandatory busing program);

Citizens Against Mandatory Bussing v. Palmason, ("CAMB II"), 80 Wash.2d 445, 495 P.2d 657, 50 A.L.R.3d 1076 (1972) (a companion case to *CAMB I*—except here plaintiffs unsuccessfully asserted, to a unanimous court, a "right" to have their children attend neighborhood schools in contravention of the District's adopted middle school desegregation plan. This case established the rule that local school districts in Washington are responsible for and have the sole right to assign students to particular schools.

Dawson v. Troxel, 17 Wash.App. 129, 561 P.2d 694 (1977) (suit unsuccessfully challenging the District's policy denying majority race (white) children the option of transferring out of the predominantly minority Garfield High School attendance area; this policy was designed to promote the desegregation of Garfield);

Coney v. Seattle School District No. 1, Civil Action No. C75-650M before the United States District Court

for the Western District of Washington (concerning the same policy challenged in *Dawson* and demanding that Garfield be closed, school boundaries be changed to require all Seattle high schools to have the same ratio of black and white students, and the neighboring school districts be drawn into a "regional desegregation plan." (Complaint, pages 16-17 filed about September 9, 1975 and dismissed May 6, 1977);

Simmons v. Seattle School District No. 1, Civil Action No. C76-134V consolidated with *Nakamura v. Seattle School District No. 1,* Civil Action No. C76-135V before the United States District Court for the Western District of Washington (these two cases also involved the District's Garfield transfer policies and sought roughly the same relief as *Coney. Simmons* and *Nakamura* were filed about February 27, 1976. They were dismissed July 29, 1977);

Numerous complaints under Title VI of the 1964 Civil Rights Act have been filed with the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare ("HEW"). Some of these complaints involved teacher assignments and bilingual education requirements ("*Lau*" compliance—named after a related lawsuit (*Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974)) in which the District was not a party). The National Association for the Advancement of Colored People ("NAACP") filed a complaint with OCR on April 22, 1977 challenging the segregation of the Seattle Public Schools and calling upon OCR to terminate all federal funding to the District until it is desgregated. This complaint was settled by a Memorandum of Agreement between OCR and the District on June 7-8, 1978.

Roe, et al. v. Seattle School District No. 1 ("Roe I"), King County Superior Court Cause No. 838291, and *Roe, et al. v. Seattle School District No. 1 ("Roe II"),* King County Superior Court Cause No. 839530, filed about December 13, 1977 and January 13, 1978, respectively (these cases challenged and sought to enjoin the District's adoption and implementation of the Seattle Plan for elimination of racial imbalance adopted by the Seattle School Board on December 14, 1977. The cases were consolidated and dismissed pursuant to the District's motion for summary judgment. They are presently on appeal to the Washington State Supreme Court);

Velikanje, et al. v. Seattle School District No. 1 and Washington State Department of Ecology, Thurston County Superior Court of Washington Cause No. 78-2-00066-2, filed in July 1978 (seeks to enjoin operation of the Seattle Plan on the theory that the District did not prepare an environmental impact statement for it. Trial of this matter has been continued pending the outcome of this action).

6.2 Since 1963 Seattle has had voluntary racial transfer programs whereby students could transfer to schools outside their residential attendance area if doing so improved racial balance in the sending and receiving schools.

6.3 In 1971 the Board voted to adopt a middle school mandatory assignment desegregation plan. Implementation of the middle school plan, which involved the creation and maintenance of five racially-balanced middle schools through mandatory student assignments, was delayed one year by reason of *Citizens Against Mandatory Bussing v. Palmason*. Adoption of the middle school plan also prompted an effort to recall four Board members who voted for the plan. The recall effort failed by a narrow margin at the polls.

6.4 Effective August 1976, the Board hired a new Superintendent, Dr. David L. Moberly, and directed him to develop and implement a desegregation program for the Seattle schools.

6.5 During the school year 1976-77 and the summer of 1977 the Seattle School District developed, publicized, and encouraged participation in a "magnet" school desegregation program. The program, implemented in 1977-78, permitted students to transfer voluntarily from their "neighborhood" schools to "magnet" schools which contained educational programs designed to attract students.

6.6 The magnet program succeeded in promoting student movement to a greater degree than had ever before been experienced. It did not succeed, however, in attracting a sufficient number of white student participants to effect a racial balancing of the system. While much of the student movement prompted by the magnet program helped to

reduce racial imbalance, a disproprotionate amount of the overall movement was by black students.

6.7 During the 1975-78 school years, a disproportionate number of Seattle's black students were participating in Seattle's desegregation programs through their voluntary or mandatory transfer to schools outside their neighborhood.

6.8 Despite the existence of extensive voluntary, magnet, and mandatory middle school desegregation programs, racial imbalance in Seattle actually increased between the 1970-71 and 1977-78 school years. The Board, therefore, concluded that a voluntary student assignment plan, standing alone, without a mandatory assignment "backup," could not effect an acceptable racial balancing of the Seattle schools.

6.9 In June 1977 the Board, in Resolution 1977-8, defined "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body." The Board then resolved to eliminate minority racial imbalance in the public schools of Seattle by the 1979-80 school year. The Board also adopted Resolution 1977-9, which directed the formulation of an extensive planning and citizen involvement process to develop desegregation strategies.

6.10 On December 14, 1977, the Board adopted Resolution 1977-78 which selected the strategies to be used in eliminating Seattle's racial imbalance. On that same day the Board directed the school district administration to continue developing the desegregation plan, which came to be known as The Seattle Plan. This plan, for the 1978-79 school year, was adopted in March 1978.

6.11 A principal element of The Seattle Plan is the initial fixed assignment of entire neighborhoods of students to schools other than those geographically closest to their homes (their "neighborhood schools") for a portion of the students' K-12 school careers. The Seattle Plan contains significant voluntary assignment program options which

are consistent with the Plan's racial balancing goals.

6.12 In taking action to effect a racial balancing of the Seattle schools, those members of the Board who voted to adopt the Plan were motivated by a number of considerations. Among those were their desire to carry out the oath of office which each took as a condition precedent to taking office, their desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race.

6.13 Implementation of the first-year phase of the Seattle Plan's two year program has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced.

6.14 Segregated housing patterns exist in the City of Seattle. These segregated housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented.

6.15 The Board intends to continue full implementation of The Seattle Plan to the extent permitted by law.

6.16 If Initiative 350 is implemented it is probable that there would be significantly less black community support for and black student participation in any voluntary program for reducing racial imbalance in the Seattle schools.

7. *Circumstances Relating to Adoption of Initiative 350*

7.1 In December 1977, a group of Washington residents, who were opposed to the racial balancing strategies then being considered by the Seattle School Board, brought suit in King County Superior Court of the State of Washington (*Roe, et al. v. Seattle School District No. 1, et al.*, King County Superior Court Cause No. 838291) to

enjoin the Board's anticipated adoption of The Seattle Plan. The application for injunction was denied by Superior Court Judge George H. Revelle on the morning of December 14, 1977; The Seattle Plan (Resolution 1977-28) was adopted that afternoon.

7.2 Subsequent to the Board's adoption of The Seattle Plan, the same citizens and others brought another state court suit (*Roe, et al. v. Seattle School District No. 1, et al.*, King County Superior Court Cause No. 839530) to enjoin the scheduled fall 1978 implementation of The Seattle Plan.

7.3 The individuals who brought these two injunctive actions and others began in December 1977 to call themselves Citizens for Voluntary Integration Committee ("CiVIC"). On January 16, 1978 they formally chartered Citizens for Voluntary Integration Committee with the State of Washington as a Washington nonprofit corporation pursuant to the provisions of RCW 24.03.

7.4 CiVIC was formed because of its founders' opposition to The Seattle Plan.

7.5 As part of the effort of CiVIC and persons acting with CiVIC to halt The Seattle Plan, CiVIC proposed an initiative for submission to the voters of the state at the 1978 general election.

7.6 Initiative 350 was patterned after previous federal legislative enactments, including the Esch Amendment, 20 U.S.C. § 1714(a), the Byrd Amendment, P.L. 94-206, § 209(90) Stat. 22), reenacted as P.L. 94-439, § 208 (90 Stat. 1434), and the Eagleton-Biden Amendment, P.L. 95-205 (91 Stat. 1460).

7.7 The purpose of these federal legislative enactments was to stop busing for school desegregation purposes except where constitutionally required.

7.8 Exept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students.

7.9 Initiative 350 was developed as a response to racial balancing efforts in Seattle as embodied in The Seattle Plan.

7.10 For a time CiVIC adopted as its publicity and campaign slogan the expression "Ban the Plan," which referred to "banning" The Seattle Plan.

7.11 The District moved for summary judgment in the pending *Roe* actions in May 1978. Judge Howard granted the District's motion for summary judgment, dismissing all of plaintiffs' claims, and signed appropriate orders on June 21 and 26, 1978.

7.12 Several of the same persons who were plaintiffs in King County Cause Nos. 838291 and 839530 then filed suit (*Velikanje, et al. v. Seattle School District No. 1, et al.*) in July 1978 in Thurston County Superior Court of the State of Washington (Cause No. 78-2-00066-2) against the District and the Washington State Department of Ecology, praying that implementation of The Seattle Plan in the fall of 1978 be enjoined due to the District's failure, pursuant to a declaratory ruling from the Department of Ecology, to prepare an environmental impact statement (EIS) in connection with The Seattle Plan. This action is currently pending.

7.13 Prior to the November 7, 1978, election and pursuant to the provisions of RCW Ch. 29.81, the Secretary of State mailed to all registered voters in the State an official Voters' Pamphlet. That pamphlet contained the text of Initiative 350, an explanatory statement drafted by the Attorney General, and arguments by proponents and by opponents of the measure. In their arguments in the pamphlet for the initiative the proponents stressed, *inter alia*, the concepts of "forced busing" and the preservation of neighborhood schools. In their arguments the opponents stressed, *inter alia*, that the adoption of the initiative would rescind Seattle's desegregation plan and would significantly increase racial segregation in Seattle, Tacoma and Pasco.

7.14 The Voters' Pamphlet, the campaigns conducted by supporters and opponents of Initiative 350, newspaper editorials and articles, and other media coverage and publicity, made clear to the electorate that Initiative 350 would require dismantling of The Seattle Plan and would prohibit school district-directed assignment and transportation of students to other than their nearest or

next nearest schools for the purpose of racially balancing public schools in the State.

7.15 During the election campaign on Initiative 350, CiVIC announced its own desegregation plan for Seattle. This plan is known as "THE CiVIC PLAN."

7.16 Initiative 350 allows voluntary desegregation, *i.e.*, the voluntary transfer assignment of students to schools away from their neighborhoods.

7.17 A part of the strategy utilized by CiVIC to terminate The Seattle Plan was to inform citizens outside the Seattle area about "the problems of mandatory busing" in Seattle.

7.18 During the campaign the proponents of Initiative 350 represented that there would be no loss of school district flexibility other than in busing for desegregation purposes.

7.19 During 1978 there were 300 school districts in the State of Washington. CiVIC campaign publicity supporting Initiative 350 and speeches given by CiVIC representatives during the election campaign assured people in school districts throughout the state that "99% of the school districts in the state would not be affected by the passage of 350." Approximately one percent of the 300 school districts in the state *are* directly affected by Initiative 350. Those school districts are plaintiffs in this litigation: Pasco, Tacoma and Seattle.

7.20 Exhibit 58 contains CiVIC's legal analysis of the Initiative as published during the campaign by CiVIC. Exhibit 58, pp. 7-21, is a copy of two opinion letters from CiVIC's attorney. Component parts of Exhibit 58 were widely circulated by CiVIC during the election campaign.

7.21 Some proponents of Initiative 350 asserted The Seattle Plan would result in substantial "white flight" and thus make desegregation impossible in Seattle. They asserted voluntary desegregation programs under Initiative 350 would prevent "white flight" and thus promote desegregation.

7.22 The terms "busing," "forced busing" and "mandatory busing," in the context of Initiative 350 were synonymous with compulsory student school reassignment

and transportation for racial balancing or desegregation purposes.

7.23 CiVIC campaign publicity supporting Initiative 350 made reference to the following: Initiative 350 and race issues [Exs. 47, 46]; "forced busing" causes greater segregation [Ex. 47, p. 1]; Seattle is not under a federal court order to desegregate [Ex. 47, p. 2; Exs. 59, 60]; "forced busing" to desegregate the public schools has not worked in other cities [Ex. 47, p. 2]; Initiative 350 "will eliminate" Seattle's "ability to use massive busing for desegregation purposes" [Ex. 51, p. 2]; Initiative 350 guarantees that state "funds are not used for forced busing of students based on racial identification" [Ex. 51, p. 5]; racial imbalance [Exs. 59, 60]; forced busing [Tr. 544, 662, 715, 801; Ex. 47, pp. 1, 3; Ex. 51, pp. 21, 24, 27; Ex. 52, p. 6; Exs. 53, 55, pp. 1-2; Ex. 56, pp. 2-4; Ex. 57, pp. 5-6, 8, 13, 15; Exs. 59, 60, 61, 62, 64, 65, 66, 67]; integration [Tr. 539; Exs. 61, 62, 64, 65, 67]; and segregation/desegregation [Tr. 539; Exs. 61, 62, 63, 64].

7.24 On November 7, 1978, Initiative 350 was approved by the voters by a margin of approximately 66 percent statewide.

7.25 In Seattle, the unofficial vote in favor of the measure was approximately 61 percent. In two Seattle Legislative Districts—Legislative District 37 and Legislative District 43—Initiative 350 failed. In Legislative District 37, where a majority of voters are racial minorities, the vote was approximately 61 percent against Initiative 350. In Legislative District 43, the vote was approximately 54 percent against the Initiative.

7.26 Initiative 350 would have taken effect as law in the State of Washington 30 days after the November 7 election, *i.e.*, on December 7, 1978 had not this litigation been initiated and a preliminary injunction issued.

7.27 The leadership of CiVIC has acted legally and responsibly in its advocacy of Initiative 350. In campaigning for the passage of Initiative 350 CiVIC has not directed its appeals to the racial biases of the voters.

7.28 It is clear from the location of school buildings and the attendance lines drawn around those buildings that the Seattle School District has traditionally adhered to a

policy of the assignment of children to their neighborhood schools.

7.29 CiVIC, its agents and consultants deliberately took steps to avoid race becoming an issue in the campaign, since, they felt, its interjection into the campaign would have lost support for the initiative.

7.30 Many parents and voters who support neighborhood schools do so in a sincere belief in the value of neighborhood schools irrespective of the racial distribution of the students attending those schools.

7.31 A neighborhood school policy has certain advantages in that it facilitates community and parental input and support for educational and extracurricular programs; it minimizes safety hazards to children in reaching school; it reduces the cost of transportation; it eases the task of student assignment through the use of easily determined standards; and it makes for better home-school communication.

7.32 Parents consider the quality and location of neighborhood schools an important factor when deciding whether or not to purchase, rent or lease a home in a given community.

7.33 Those voters who voted for Initiative 350 were not all motivated to do so by the same reason. Voters were motivated to do so by a number of reasons. It is impossible to ascertain all of those reasons nor to determine the relative impact of those reasons upon the electorate.

8. *General Effects of Initiative 350 on Plaintiff School Districts*

8.1 Implementation of Initiative 350 will compel those school districts which have adopted compulsory student assignment as a means of racially balancing their schools, to abandon all those efforts which cannot be accomplished by the transfer of students to their nearest or next nearest schools. Those school districts will in consequence become more racially imbalanced than they are at present.

8.2 If permitted to become law, Initiative 350 will remove from local school districts their existing authority

under state law (declared in *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972)) to assign students to other than their nearest or next nearest schools in order to improve racial balance.

8.3 Except for racially-balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools.

8.4 Section 3 of Initiative 350 lists seven tools or methods which educational authorities are specifically prohibited from utilizing to require attendance by students at schools other than their nearest or next nearest schools. Each of those seven tools or methods is an element of The Seattle Plan.

8.5 It would be impossible to effect a racial balance of Seattle schools without resort to some or all of the tools or methods prohibited by Section 3 of Initiative 350.

8.6 The seven tools or methods prohibited by Section 3 of Initiative 350 are commonly found in public school racial desegregation plans put into effect in this country during the past 25 years.

8.7 Section 6 of Initiative 350 requires a judicial declaration of duty to desegregate before a local school district may with assurance mandatorily reassign students to other than their nearest or next nearest schools for racial balancing purposes. No other aspect of mandatory student assignment is burdened with this requirement.

8.8 Except for the busing of students for racial balancing purposes, almost all of the busing of students currently taking place in this state is permitted by Initiative 350.

9. *Effects of Initiative 350 on Pasco*

9.1 Because of the housing patterns in Pasco, it is doubtful that the Pasco schools can be racially balanced within the "nearest or next nearest" restrictions of Initiative 350.

10. *Effects of Initiative 350 on Tacoma*

10.1 If implemented, Initiative 350 will make it impossible for Tacoma schools to maintain their present racial balance.

11. *Effects of Initiative 350 on Seattle*

11.1 If implemented, Initiative 350 will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is.

11.2 If subject to the limitations of Initiative 350, the Seattle schools cannot attain the goal of racial balancing set by The Seattle Plan.

11.3 It is impossible at this time to know or to predict whether The Seattle Plan will cause more or less movement of white families from the Seattle School District than would occur under Initiative 350. Under Initiative 350, however, there is certain to be movement of white parents away from those residential areas where there is a preponderance of minority families.

12. *Supplemental Findings*

(The numbers of these supplemental findings indicate the sections in which these findings should fall.)

3.1(a) The adverse effects of racially imbalanced schools fall most heavily upon minority students.

8.9 Initiative 350 does not permit a school board to assign students for the purpose of remedying *de jure* segregation in the absence of a court declaration or order requiring the board to do so.

8.10 Initiative 350 does not permit a local community which desires a racially-integrated educational experience for its students to cause students to be assigned to schools other than their nearest or next nearest schools in order to accomplish that purpose in the absence of a court declaration or order requiring the school board of that district to do so.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. The jurisdiction of this Court exists under United States Code Title 28, Sections 1331 and 1343.

2. This action presents questions of actual controversy between the parties involving substantial legal and constitutional issues as to the validity of Initiative 350.

3. Initiative 350 is unconstitutional in that it denies equal protection of the laws to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:

1. It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969); *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971). No compelling state interest justifies that racial classification.

2. A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 39 CCH S.Ct.Bull. 2918 (June 5, 1979).

3. It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation. *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal.3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971).

4. Plaintiffs are entitled to a declaratory judgment declaring Initiative 350 to be unconstitutional.

5. Plaintiffs are entitled to a permanent injunction against the enforcement of the provisions of Initiative 350 by defendants or any of their instrumentalities, agents or employees.

MEMORANDUM OPINION

I am filing this memorandum opinion in conjunction with my findings of fact and conclusions of law in order to spell out the reasoning behind my conclusions.

Although Initiative 350 was adopted by a referendum vote, it is clear that the sovereignty of the people is subject to constitutional limitations just as are legislative enactments. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969). For that reason the initiative is necessarily subject to the same scrutiny that it would be had it been adopted by the legislature.

After considering all of the evidence and all applicable law, I am compelled to find Initiative 350 unconstitutional upon several grounds: (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

In making the finding that the initiative is unconstitutional because it permits busing for non-racial reasons but forbids it for racial reasons, I rely primarily upon *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971).

In *Hunter* the electorate of the City of Akron amended the charter of that city to provide that any ordinance enacted by the city council dealing with racial, religious or ancestral discrimination in housing would not become effective unless approved by a majority of the city voters. The charter imposed this requirement of voter approval upon no other type of ordinance. The Supreme Court found this amendment to be a denial of the equal protection of the laws in that it created an explicitly racial classification by treating racial discrimination in housing differently from all other matters relating to housing. By making it more

difficult for minorities to secure the enactment of an ordinance dealing with racial discrimination, the charter placed burdens upon racial minorities within the governmental process that it did not place upon other citizens. It hence denied to those minorities the equal protection of the laws.

In *Lee v. Nyquist* a three-judge court applied the *Hunter* rationale to strike down a New York statute which provided as follows:

> "Except with the express approval of a board of education * * * a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race * * *"

The court found that while the State Commissioner of Education had broad supervisory powers over local public education with regard to all matters affecting educational policy, the statute singled out for different treatment the assignment of students on account of race. The court stated at page 719:

> "The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools."

The court added:

> "We can conceive of no more compelling case for the application of the *Hunter* principle."

The provisions of Initiative 350 relevant to this opinion are as follows:

> Section 1. * * * no school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * * except in the following instances:
>
> (1) If a student requires special education, care or guidance * * *
>
> (2) If there are health or safety hazards * * * or physical barriers or obstacles * * * between the

student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

Section 3. For purposes of section 1 of this act "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *," includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the re-organization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

Section 4. For the purposes of section 1 of this act, "special education, care or guidance" includes the education, care or guidance of students who are physically, mentally or emotionally handicapped.

Section 5. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students.

Section 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

Sections 1 and 4 of the initiative expressly provide that a school board may require a student to attend any school, even though not the one nearest or next nearest his place of residence, for a variety of reasons unrelated to race. A school board may require a student to attend whatever school it chooses if the student is in need of special education of any kind or if the student is suffering from any physical, mental, or emotional handicap or if there are health or safety hazards connected with his attending his nearest or next nearest school or if the nearest or next

nearest school is inadequate by reason of overcrowding or the lack of physical facilities.

The foregoing reasons for mandatory student assignment comprise one major exception the primary reasons that students are at the present time being assigned to schools other than their neighborhood schools. That one major exception is the assignment of students for racial balancing purposes. Student assignment for that purpose is not permitted by Initiative 350.

By omitting assignments for racial reasons from the list of permitted categories of student assignments, Initiative 350 effects implicitly the same type of racial classification which the New York statute in *Lee v. Nyquist* effected expressly.

Although the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes. It is no less a denial of the equal protection of the law to minorities.

As a second ground for holding Initiative 350 to be unconstitutional, I find that a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative.

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Supreme Court held that a governmental action was not a denial of equal protection simply because that action had a racially disproportionate impact. For the action to be unconstitutional the Court held that there must be proof that there was in addition a racially discriminatory intent or purpose.

It is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350. It was a measure adopted by the electorate at the ballot box. Unlike the normal legislative enactment there were no committee hearings or floor debates to cast light upon the intent of the enactors.

I believe that I can safely assume that a great many voters were motivated solely by a conviction that it was in the best interests of all children that they be permitted to attend their neighborhood schools; that there were many voters who were motivated solely by a desire to maintain as much racial separation as possible in the public schools; and that in between there were many voters who voted with varying degrees of mixed motives.

In deciding whether a racially discriminatory intent or purpose lay behind the adoption of Initiative 350, I cannot base my judgment upon what I believe I may "safely assume" as to the subjective intent of the voters. As to that subjective intent the secret ballot raises an impenetrable barrier.

The fact that it is impossible to determine whether there was subjectively a racially discriminatory intent or purpose does not, however, relieve this court of the burden of determining whether there was in fact such an intent or purpose behind the adoption of Initiative 350. One must simply look elsewhere than within the minds of the voters.

Two Supreme Court cases, *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) and *Personnel Administrator of Massachusetts v. Feeney*, 39 CCH S.Ct.Bull. 2918 (June 5, 1979), give guidance to a court in determining in an objective fashion whether a discriminatory intent or purpose was a motivating factor in governmental action.

In *Arlington Heights* three black petitioners and a development corporation challenged a denial by the village of an application for the rezoning of a tract of land from a single-family to a multiple-family classification. The rezoning was assertedly to enable the developer to build a racially-integrated, low and moderate income housing project upon the land. In trying to determine whether there was a racially discriminatory intent in the denial of the application, the Court considered five factors:

a) The impact of the action, i.e., whether it bore more heavily upon one race than upon another;

b) The historical background of the decision;

c) The specific sequence of events leading to the decision;

d) The procedural and substantive departures from the norm in connection with the decision or action; and

e) The legislative or administrative history of the decision or action.

In considering these five factors, the Court found that the tract of land had been zoned for single-family residences since 1959 when the village first adopted its zoning map; that single-family homes surrounded the tract of land in question; that the village had always been committed to single-family homes as its dominant residential land use; that there had been no departure from normal procedure in the consideration of the application; and that the zoning denial did not appear substantively improper in light of all the information which was before the zoning board. Based upon a consideration of those factors, the Court held that no discriminatory intent or purpose had been demonstrated in the denial of the rezoning application.

In *Feeney* the Court again applied the *Arlington Heights* factors. In that case the Court upheld a veterans' preference law in Massachusetts that had been challenged on the ground that it discriminated against women. The Court examined the relevant legislative history and found that a veterans' preference was first declared by Massachusetts in 1884 and that from its inception the law established a preference for veterans over nonveterans, not a preference for men over women. The Court analyzed past legislative actions with respect to military service and found that veterans were overwhelmingly male largely because women had never been subject to a military draft. Given the sexual neutrality of the statutory history and the sexual one-sidedness of military service, the Court found that an intent to discriminate against women had not been a motivating factor in the enactment or extension of the veteran's preference law in Massachusetts and that it was in consequence not a denial of equal protection.

Examining Initiative 350 in light of the factors articulated by the Supreme Court in *Arlington Heights* and

Feeney, one is led to the conclusion that a racially discriminatory purpose was in fact a motivating factor in the passage of Initiative 350.

The first consideration is that of the impact of the action. While it is true that a statute cannot be held unconstitutional solely because it has a racially disproportionate impact, the impact of the action must be weighed in determining whether there was discriminatory intent. Justice Stevens, in his concurring opinion in *Washington v. Davis*, observed at 426 U.S. page 253, 96 S.Ct. at page 2054:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."

In *Feeney* the Court noted that discriminatory purpose implied more than an awareness of the consequences of one's actions but added that when adverse consequences of a law upon a minority are inevitable "a strong inference that the adverse effects were desired can reasonably be drawn." (n. 25, p. 2942)

It appears from the evidence that the overall education of students in a school system suffers when the schools of that system are racially imbalanced, that the greater the imbalance the greater the impairment and that there is a disproportionate impact upon the education of minority children when their schools are racially imbalanced.

Beyond question the informed voters of the state, and the voters in general in Seattle, were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students. Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students. This impact of Initiative 350 was a certainty, in marked contrast to the uncertain and speculative impact of the verbal skills test used to select police recruits in *Washington v. Davis* and

the denial of the rezoning application in *Arlington Heights.*

The second and third factors utilized by the Court in *Arlington Heights* were the historical background of the decision and the specific sequence of events leading to the decision. In *Washington v. Davis, Arlington Heights* and *Feeney,* the Court examined all events surrounding the action in question: legislative enactments, board hearings, floor debates, and historical circumstances at the time each action was taken. In each of these situations, the Court found a race or gender-neutral pattern of conduct, with no evidence that would suggest a discriminatory purpose as a motivating factor in the decision-making process.

The same cannot be said with respect to the adoption of Initiative 350 inasmuch as it was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments. If implemented, the initiative will achieve that purpose. One must assume therefore that the voters, in adopting the initiative, intended to accomplish the very purpose for which the initiative was designed and intended therefore the disproportionate racial impact which its implementation will have.

The very words of the initiative reveal the intent to frustrate the plan of the Seattle School Board. Section 3 of the initiative expressly forbids the use of the entire panoply of tools or methods adopted by the board in its plan for racially balancing the Seattle schools. Except for voluntary student assignment options, Section 3 forbids every major, effective technique for achieving racial balance.

The historical background and sequence of events leading up to the adoption of the initiative reveals a whole series of lawsuits and a recall election, the objective of which was to prevent the racial balancing of Seattle schools by means of mandatory student assignments. It reveals, too, that the adoption of the plan of racial balancing by the Seattle School Board was the event which gave rise to the thought of a statewide initiative as a means of thwarting that decision.

The court in *Arlington Heights* also considered proce-

dural and substantive departures from the norm as factors bearing upon intent or purpose.

In the adoption of Initiative 350 there was a marked departure from the procedural norm in that an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by that plan and who could not conceivably be affected by any plan for the mandatory assignment of students for racial balancing purposes.

It was also a marked departure from the norm, in terms of historical and current practices of local school districts, for the autonomy of school boards to be restricted relative to the assignment of students. Traditionally, student assignment has been a proper function of school boards. Local autonomy of school districts has long been recognized as a vital national tradition. *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Even the New York statute in *Lee v. Nyquist* did not attempt to proscribe the student assignment powers of elected school boards. Yet Initiative 350 reaches all school boards. This state preemption of local autonomy, when directed at racial concerns, is clearly a departure from prior state practice.

The racially disproportionate impact of the initiative when coupled with its historical background, the sequence of events leading to its adoption and the departure from the procedural norm demonstrate that a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative.

Even if Initiative 350 were not unconstitutional on its face and even if racially discriminatory purpose were not one of the motivating factors in its formation and purpose the initiative must still fall by reason of the breadth of its impact.

I find that Initiative 350 is overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is *de jure* segregation, that is, segregation caused by prior governmental action.

School boards of districts in which there is *de jure* segregation are charged with an affirmative duty to take

whatever steps might be necessary to eliminate that segregation. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). A statute which proscribes one of the means, if not the only means, of achieving that end must yield to constitutional requirements. *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669, 680 (1971).

Initiative 350 makes no provision for a school board which may have a constitutional obligation to remedy *de jure* segregation. The initiative proscribes a school board's use of student assignment in order to achieve racial balance under *any* circumstances. Any school board which is of the opinion that *de jure* segregation exists within its district is placed in the untenable position of being in violation of constitutional requirements or of being in violation of the prohibitions of Initiative 350. Its only recourse under the initiative is to initiate litigation in order to have a court declare the course of action that it should take.

Plaintiffs contend that Initiative 350 is violative of the Washington State Constitution. As to that contention, I make no finding.

Because Initiative 350 is violative of the United States Constitution, plaintiffs are entitled to a permanent injunction against the enforcement of Initiative 350 by defendants, their instrumentalities, agents or employees.

APPENDIX B

SEATTLE SCHOOL DISTRICT No. 1 et al., Plaintiffs-Appellees,

v.

THE STATE OF WASHINGTON et al., Defendants-Appellants.

Nos. 79-4643, 79-4655, 79-4676, 79-4740,
79-4801 and 79-4802.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted June 30, 1980.
Decided Dec. 16, 1980.

Before ELY, WRIGHT and NELSON, Circuit Judges.

ELY, Circuit Judge:

This cause comes before the Court in an unusual posture. Local elected school authorities, who so often in the past in other jurisdictions have resisted court-ordered integration, have in this instance invoked the jurisdiction of the federal courts because their self-generated efforts to achieve racial balance in the public schools have been hindered by governmental action. Successful, locally-formulated public school desegregation programs in Washington are today threatened with extinction through enforcement of a Washington State statute by State officials.

The Seattle, Tacoma, and Pasco, Washington, school boards, in an effort to correct substantial racial imbalance in the public schools in those communities, have in recent years implemented a series of voluntary and mandatory desegregation programs. Because of persistently segregated residential housing patterns in the three metropolitan areas, these desegregation plans have necessarily entailed some assignment of students to schools other than those closest to their homes. The success of these programs has been manifest, and the "Seattle Plan" in particular has been hailed as a model for other large cities.

The continued efficacy of these programs became

imperiled, however, in November 1978, when Washington voters adopted ballot Initiative 350 by a substantial statewide margin. Initiative 350 provides, in pertinent part, that:

> no school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *.

In November 1978, after the State threatened enforcement of Initiative 350, the three school districts filed a complaint in the District Court seeking a declaratory judgment that the statute was unconstitutional under the equal protection clause of the Fourteenth Amendment. In December 1978, prior to certification of Initiative 350 as a state law pursuant to Wash.Rev.Code § 29.62.130 (1974), the District Court issued a temporary restraining order barring enforcement. On February 9, 1979, the District Court issued a preliminary injunction continuing to block implementation of the statute and at the same time granted the motion of eight Washington public interest groups to intervene. Also on February 9, the District Court bifurcated the litigation. Phase I, from which this appeal is taken, was limited to the question of the constitutionality of Initiative 350. Phase II issues, which were not reached at trial because the District Court held that the statute violated the Fourteenth Amendment, derive from the intervenors' claim that the school districts operate unconstitutional dual school systems.

After an extended trial, District Judge Voorhees, on June 15, 1979, issued a Memorandum Opinion, together with Findings of Fact and Conclusions of Law, declaring Initiative 350 unconstitutional. *Seattle School Dist. No. 1 v. State of Washington*, 473 F.Supp. 996 (W.D. Wash. 1979). He concluded that Initiative 350 was unconstitutional on three distinct grounds:

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly

> inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

473 F.Supp at 1012.

On August 29, 1979, the District Court issued a final order declaring Initiative 350 unconstitutional and permanently enjoining its enforcement. Also on August 29, the District Court issued a separate order denying the school districts' and intervenors' separate motions for attorney's fees.

Appellants, the State of Washington and various state officials, appeal from the District Court judgment declaring Initiative 350 unconstitutional. Appellees, the three Washington school districts and intervenors, cross-appeal from the order denying their motion for attorney's fees. One of the intervening appellees, East Pasco Neighborhood Council, also cross-appeals from the denial of its motion that the Pasco School District be dismissed as a plaintiff.[1] The United States appeared, and continues to appear, as an *intervenor* in support of the plaintiffs-appellees.

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[1]The Council raises a threshold jurisdictional question, arguing that because the State has not threatened to enforce Initiative 350 against Pasco School District ("Pasco"), it does not have standing to challenge the statute under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1979). We disagree. It is true that claims alleging the unconstitutionality of a statute are normally non-justiciable in the absence of immediate threatened prosecution. *Poe v. Ullman*, 367 U.S. 497, 501-09, 81 S.Ct. 1752, 1754-59, 6 L.Ed.2d 989 (1961). Nevertheless, if the circumstances of the dispute provide sufficient guarantees that a genuine case or controversy exists, a federal court may assume jurisdiction even in the absence of a direct threat of enforcement against the plaintiff. *See Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-305, 99 S.Ct. 2301, 2308-12, 60 L.Ed.2d 895 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682-84, 97 S.Ct. 2010, 2014-15, 52 L.Ed.2d 675 (1977); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 136-48, 95 S.Ct. 335, 354-61, 42 L.Ed.2d 320 (1974); *Steffel v. Thompson*, 415, U.S. 452, 458-60, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504-08, 92 S.Ct. 1749, 1754-56, 32 L.Ed.2d 257 (1972); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

In this case, four factors indicate that an actual case or controversy exists between Pasco and the State despite the absence of a specific threat, as against Pasco, to enforce Initiative 350. First, this is a highly

I. *Constitutionality of Initiative 350—The Appeal*

We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. Hunter v. Erickson, 393 U.S. 385, 391-93, 89 S.Ct. 557, 560-61, 21 L.Ed.2d 616 (1969); *Lee v. Nyquist*, 318 F.Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971).

We note at the outset the operative legal and political effect of Initiative 350. As the District Court below said, the statute "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." 473 F.Supp. at 1015.[2] We agree with the District Court that

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specific statute, clearly applicable to Pasco's student assignment policies. *See Doe v. Bolton*, 410 U.S. 179 at 187-89, 93 S.Ct. 739 at 745-46, 35 L.Ed.2d 201; *Crossen v. Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971). Second, Initiative 350 is a recent statutory enactment and not a law which has lain moribund for years. *See Poe v. Ullman*, 367 U.S. at 501, 81 S.Ct. at 1754; *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 12 (9th Cir.), *cert. denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974) (Browning, J., dissenting). Third, there have been immediate threats of enforcement against parties whose legal status under Initiative 350 is identical to that of Pasco, *i.e.*, the Seattle and Tacoma School Districts. *See Steffel v. Thompson*, 415 U.S. at 459, 94 S.Ct. at 1215 (prosecution of plaintiff's companion); *Carey v. Population Servs. Int'l*, 431 U.S. at 684 n.3, 97 S.Ct. at 2015 n.3 (prosecution under predecessor statute). Fourth, because this is a civil rather than a criminal statute, it imposes an affirmative duty to comply. "[I]f appell[ees] are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion," *Lake Carriers Ass'n v. MacMullan*, 406 U.S. at 507, 92 S.Ct. at 1755 at least where there is an indication, as in this case, that the statute will be enforced in the future. *Id. See also Independent Bankers Ass'n v. Heimann*, 613 F.2d at 1164, 1167 (D.C. Cir. 1979); *Southern Pac. Transp. Co. v. Redden*, 458 F.Supp. 593, 599-60 (D. Or. 1978).

[2]Judge Voorhees' Finding of Fact No. 8.2 was that "Initiative 350 will remove from local school districts their existing authority under state law * * * to assign students to other than their nearest or next nearest schools in order to improve racial balance." 473 F.2d at 1010 (*Citing Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972) (en banc)). This finding is supported by the evidence and the conclusion is not clearly erroneous. Fed.R. Civ.P. 52(a).

> [a]lthough the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes.

Id. at 1013.[3] Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason.[4]

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[3]Initiative 350 provides in its entirety as follows:

Section 1. Notwithstanding any other provision of law, after the effective date of this act no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances:

(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

Section 2. In every such instance where a student is assigned and transported to a school other than the one nearest his place of residence, he shall be assigned and transported to the next geographically nearest school with the necessary and applicable courses and facilities within the school district of his or her residence.

Section 3. For purposes of section 1 of this act, "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student" includes, but is not limited to, implementing, continuing, pursuing, maintaining or

The constitutional framework established in *Hunter v. Erickson* and *Lee v. Nyquist* dictates that Initiative 350 must fall. In *Hunter*, the Supreme Court invalidated an amendment to the Akron City charter requiring that any fair housing ordinance passed by the city council be approved by a majority of the city voters prior to becoming law. The Court struck down the amendment on equal protection grounds because it created "an explicitly racial

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operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

Section 4. For the purposes of section 1 of this act "special education, care or guidance" includes the education, care or guidance of students who are physically, mentally or emotionally handicapped.

Section 5. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students.

Section 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

Section 7. Sections 1 through 6 of this act are added to chapter 223, Laws of 1969 ex. sess. and shall constitute a new chapter in Title 28A RCW.

Section 8. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

'Judge Voorhees' Finding of Fact No. 8.3 was that "[e]xcept for racially balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." 473 F.Supp. at 1010.

That the statute does not contain an explicit racial classification is of no consequence if the law is not neutral. In *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), the Supreme Court clearly indicated that "[i]f the [challenged statutory] classification itself, *covert or overt*, is *not* based upon gender, the *second question* is whether the adverse effect reflects invidious gender-based discrimination." *Id.* at 274, 99 S.Ct. at 2293 (emphasis added). Because, as discussed above, Initiative 350 contains a covert racial classification, it is not a neutral law and the disparate impact analysis does not apply.

classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389 S.Ct. at 559.

The Court in *Hunter* also noted that the amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination," but also restructured the existing political process to require the approval of the electorate before any future ordinance could take effect. *Id.* at 389-90, 89 S.Ct. at 559-60. By so altering the governmental structure on matters concerning a racial distinction, making it more difficult for minorities to secure favorable legislation, the amendment placed unconstitutional "special burdens on racial minorities within the governmental process." *Id.* at 391, 89 S.Ct. at 560. We agree that "[t]he principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee v. Nyquist*, 318 F.Supp. at 718.

In *Lee*, a three-judge district court applied *Hunter* to strike down a New York statute that prohibited racially-conscious student assignment by appointed school boards, but not by elected boards. The statute was unconstitutional, the court said, because it "creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." 318 F.Supp. at 719.

Applying these principles here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of

Hunter and *Lee*. Unless this Court affirms the relevancy of the constitutional analysis applied in *Hunter* and *Lee* to this case, the guarantee of equal protection of laws will become a hollow shell. Lawmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals.

The racial classification embodied in the statute is invlaid unless it is the least drastic means required to achieve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192-96, 85 S.Ct. 283, 288-90, 13 L.Ed.2d 222 (1964). *See Hunter v. Erickson*, 393 U.S. at 391-93, 89 S.Ct. at 560-61; *Lee v. Nyquist*, 318 F.Supp. at 720. We have no reason to dispute the District Court's finding that the legislative purpose of Initiative 350 was to restore the Seattle School District's traditional policy of assigning students to their neighborhood schools.[5] However, while "[a] neighborhood school policy is not constitutionally suspect," *Diaz v. San Jose Unified School Dist.*, 612 F.2d 411, 415 (9th Cir. 1979), it is the locally elected school authorities who "are traditionally charged with broad power to formulate and implement educational policy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). Locally elected school boards even possess "broad discretionary powers" to prescribe a fixed proportion of racial mix in each school as an educational policy. *Id.*

In fact, the Supreme Court struck down a North Carolina statue that flatly prohibited the assignment of any public school student on account of race or for the purpose of creating a racial balance in the schools in *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).[6] There, the Court reiterated that

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[5]Judge Voorhees' Finding of Fact No. 7.28 was that "the Seattle School District has traditionally adhered to a policy of the assignment of children to their neighborhood schools." 473 F.Supp. at 1009.

[6]The anti busing law, the Court said, was invalid because it "would inescapably operate to obstruct the remedies granted by the District Court" to eliminate the existing dual school system created by an unconstitutional background of *de jure* segregation. 402 U.S. at 45, 91 S.Ct. at 1285.

> as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.* * * * [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall * * *.

Id. at 45, 91 S.Ct. at 1285 (emphasis added).

That the Seattle Plan was self-imposed and not required as a remedial measure by a federal district court[7] does not alter or enhance the significance of Washington State's interest in mandating a state-wide neighborhood school policy.[8] As the three-judge panel observed in *Lee v. Nyquist*, a finding of *de jure* segregation is irrelevant when majoritarian political processes are used to frustrate minority participation:

In *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), the Supreme Court emphasized the importance of local control over education. Local autonomy and diversity are so important to public education, the Court held in *Milliken*, that judicial desegregation remedies could not exceed the geographical scope of the constitutional violation:

> [T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. *No single tradition in public education is more deeply rooted than local control over the operation of schools*; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. * * * Thus, in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50, 93 S.Ct. 1278, 1305, 36 L.Ed.2d 16 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

418 U.S. at 741-42, 94 S.Ct. at 3125 (citations omitted) (emphasis added). *See also Wright v. Council of City of Emporia*, 407 U.S. 451, 469, 92 S.Ct. 2196, 2206, 33 L.Ed.2d 51 (1972) ("Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society * * *."); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955) (*Brown II*) (school authorities "have the primary responsibility for elucidating, assessing, and solving" varied local school problems engendered by race); *Martin v. Charlotte Mecklenburg Bd. of Educ.*, 626 F.2d 1165, 1167 (4th Cir. 1980); note 9 *infra*.

[7]The District Court did not reach the question of whether the school districts were under a constitutional duty to desegregate. The District

> The statute places *burdens* on the implementation of educational policies designed to deal with race on the local level.
>
> * * * * *
>
> * * * The * * * Legislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest.
>
> The statute thus operates to disadvantage a minority, a racial minority, in the political process. There can be no sufficient justification supporting the necessity of such a course of action.

318 F.Supp. at 719-20. *See also Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir. 1980).

The State's argument that *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton I*), permits official rescission

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Court bifurcated the litigation, and the intervenors' claims that the school districts operate unconstitutional dual school systems were not addressed in Stage 1.

[9]Had a successor school board to the one that adopted the Seattle Plan instead of the state electorate as a whole attempted to repeal or rescind the self imposed student assignment plan, we would be faced with a quite different issue. In *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton I*), the Court discussed a school board's rescission of a previously adopted resolution which it was under no constitutional duty to promulgate affecting the assignment of pupils:

> The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:
>
> > The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took. * * * If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation.

(*Quoting Brinkman v. Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974) (citations omitted)). *Accord, Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 531 n.5, 99 S.Ct. 2971, 2976 n.5, 61 L.Ed.2d 720 (1979) (*Dayton II*). Under this standard, the constitutionality of Initiative 350 would hinge on the Stage II determination of whether the Seattle School District has maintained a dual system or practiced *de jure* segregation.

of previously adopted desegregation measures as long a there was no antecedent constitutional duty to remedy *de jure* segregation ignores the crucial fact that a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control. Initiative 350, unlike the situation in *Dayton I*, results in the political process being skewed at the expense of local representative bodies and their constituencies. *See* note 8, *supra*.

The opponents of desegregation who reside in the Seattle School District resorted to the state-wide initiative mechanism only after unsuccessful attempts to recall four elected school board members in 1971-72, *see* Finding of Fact No. 6.3, 473 F.Supp. at 1006, and to block the Seattle Plan in the courts, *see* Findings of Fact Nos. 7.1, 7.2, and 7.11, 473 F.Supp. at 1007-08. The effect of Initiative 350 is to restructure the state's political and administrative process so as to *remove* from local school boards their existing authority, and in large part their capability,[9] to enact programs designed to desegregate the schools. Initiative 350 effectively disenfranchises the voters of the local school districts with respect to local educational matters. The interest of the State of Washington in mandating a state-wide policy of neighborhood schools must, in these circumstances, fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy. Therefore, we hold that Initiative 350, which attempts to wrest from local control the formulation and implementation of educational and desegregation policies, is not supported by any compelling state interest; consequently, the statute is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment.[10] *See Hunter v.*

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[9]Judge Voorhees' Finding of Fact No. 8.5 was that "[i]t would be impossible to effect a racial balance of Seattle schools without resort to some or all of the tools or methods prohibited by Section 3 of Initiative 350", 473 F.Supp. at 1010. This holding is not clearly erroneous. Fed.R.Civ.P. 52(a).

[10]*Cf. Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d 1381, 1388-90 (9th Cir. 1980), *cert. denied sub nom.*

Erickson, 393 U.S. at 393, 89 S.Ct. at 561 ("the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."); *Lee v. Nyquist*, 318 F.Supp. at 720.

The appellants contend that *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980) should control the outcome here. We disagree. In *Brown*, the D.C. Circuit upheld the constitutionality of a series of amendments to congressional appropriations bills which prevent the Department of Health, Education, and Welfare from withholding federal funds from school districts which subscribe to a neighborhood school student assignment policy. The Eagleton-Biden amendment, typical of the challenged provisions, provides that

> [n]one of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home [except for a student requiring special education], * * * in order to comply with Title VI of the Civil Rights Act of 1964.

Quoted in Brown v. Califano, 627 F.2d at 1226 n.26.

Brown is distinguishable in a number of fundamental respects. Although the statutory language of Initiative 350 and the Eagleton-Biden amendment are superficially similar, the operative and intended effects of the statutes are vastly different. The Title VI amendments were merely an internal administrative housekeeping measure designed to limit HEW's ability to order mandatory busing. The legislative history indicates that Congress simply intended to prevent the HEW bureaucracy from acting solely on its own authority in administrative proceedings to coerce local school districts into adopting busing plans. "An explicit,

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National Ass'n of Minority Contractors v. Associated Gen. Contractors, ___ U.S. ___, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980) (state's interest in lowest-bid contracting policy governing *employment* in publicly funded construction projects is paramount to school board's *non-educational* interest in voluntarily adopting a minority set-aside affirmative action program).

major purpose of the amendments was to take 'HEW out of the busing business.' In other words, Congress wanted to ensure that mandatory busing orders derive either from local school officials or federal courts." *Id.* at 1231, *quoting* 122 Cong.Rec. 21198 (1976) (remarks of Sen. Biden) (footnotes omitted). Judge Bazelon noted that:

> the instant case does not *involve a flat prohibition against involuntary busing.* The amendments challenged here merely restrict one federal agency's ability to induce busing as a condition of receiving federal funds. *Local school officials still may voluntarily employ transportation to desegregate * * *. [A]ll reasonable desegregation methods remain available to school officials and to courts.*

627 F.2d at 1229 (emphasis added) (footnote omitted).

Here, Initiative 350 flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. This is significantly different from the amendments, which the *Brown* court concluded did not "make [a] classification along impermissible [racial] lines." *Id.* at 1230. Because Initiative 350 *does* preclude local school authorities from voluntarily busing to achieve desegregation, and does so via a statute that embodies a burdensome racial classification, *Brown v. Califano* is inapposite.

Therefore, for the reasons stated herein, the judgment of the District Court that Initiative 350 is unconstitutional is affirmed.

II. *Attorney's Fees—The Cross-Appeal*

After the decision on the merits, the appellees requested attorney's fees as authorized by two statutes. The Civil Rights Attorney's Fees Award Act of 1976 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title * * * or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of * * * title VI of the Civil Rights Act of 1964, the court, *in its discretion,* may

> allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1980) (emphasis added). Section 718 of the Emergency School Aid Act also provides that:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this subchapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, *in its discretion*, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

20 U.S.C. § 3205 (1980) (emphasis added). The District Court denied the motions, and appellees cross-appealed for review of that judgment.

The general attorney's fees statute, § 1988, and the statute dealing specifically with school desegregation cases, § 3205, share the same language and are to be construed together. *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 621-22 (4th Cir. 1978); *see Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (per curiam). The Supreme Court has interpreted these statutes as requiring that "the successful plaintiff 'should ordinarily recover an attorney's fee *unless* special circumstances would render such an award *unjust*.' " *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, 93 S.Ct. at 2202, *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). Our Court has examined two factors in determining if a case involves "special circumstances" which would make an award "unjust": (1) whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the Acts, and (2) the balance of equities. *See Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979); *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979).

The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law. S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News, p. 5908; H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

The District Court concluded that an award of attorney's fees in this case was not necessary because the school districts are publicly-funded entities. There is nothing in the language or legislative history of the statutes, however, indicating a congressional intent to limit attorney's fees to private parties. As long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes. *Dennis v. Chang*, 611 F.2d at 1304-07; *Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980); *Palmigiano v. Garrahy*, 616 F.2d 598, 600-03 (1st Cir. 1980). *See Holley v. Lavine*, 605 F.2d 638 (2d Cir. 1979), *cert. denied sub nom. Blum v. Holley*, 446 U.S. 913, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980); *Weisenberg v. Huecker*, 593 F.2d 49 (6th Cir.), *cert. denied*, 444 U.S. 880, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978) (allowing awards to publicly-funded legal services corporations).

The State argues that even if a publicly-funded entity is eligible to receive legal fees under the statutes, an award would be inappropriate in this case because the "special circumstance" of an absence of bad faith on the part of the state officials makes an award in this case "unjust." While absence of bad motives precludes an award against named defendants in their individual capacities, *Hutto v. Finney*, 437 U.S. 678-700, 98 S.Ct. 2565, 2574-78, 57 L.Ed.2d 522 (1978), it does not bar an award against the state or named individuals in their official capacities. *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980); *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 204 n.1 (5th Cir. 1980); *Internal Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502, 504 (5th Cir. 1980); *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979); *Haycraft v. Hollenbach*, 606 F.2d 128, 132 (6th Cir. 1979).

After full consideration of the facts in this case, we

conclude that the District Court abused its discretion in denying the school districts' motion for attorney's fees. The judgment on this issue is reversed and the cause remanded for the purpose of determining the amount of the award.

The District Court also denied intervening appellees' separate motion for attorney's fees, not, as the State suggests, because intervenors could not be included in the statutory category of "prevailing parties," but rather because they played a *de minimis* role in the trial on the merits. After examining the record, we conclude that the District Court was within its discretion in denying intervenors' motion inasmuch as the request was conditioned on their level of participation in the Phase I litigation. Intervenors, however, also necessarily devoted substantial time and effort to preparation for trial on the Phase II issues. This pre-trial preparation was essential because it was apparent from the onset of this case that the school districts would not be in a position to argue they were operating dual school systems if Initiative 350 were found to be constitutional. The burden of litigating the Phase II issues would have been the sole reponsibility of the intervenors.

An award of attorney's fees for time spent on a particular issue is not precluded merely because developments in the course of the litigation make it unnecessary to consider that specific question. "Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues. * * *" *Maher v. Gagne*, ___ U.S. ___, ___, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). *Accord, Williams v. Alioto*, 625 F.2d at 848. The legislative policy of encouraging constitutional litigation, which led Congress to specify that an award is permissible for an issue which is not fully litigated if constitutional rights are vindicated through the mechanism of a consent decree or other preliminary relief, S. Rep. No. 1011 at 5, [1976] U.S. Code Cong. & Ad. News at 5912-13, also supports an award for expenses incurred in the preparation of issues which were not reached if the same constitutional values are advanced through resolution of another claim. *See Northcross v. Board of Educ. of Memphis*, 611 F.2d

624, 635-36 (6th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Brown v. Bathke*, 588 F.2d 634, 637-38 (8th Cir. 1978); *Busche v. Burkee*, 483 F.Supp. 1326, 1328 (E.D. Wis. 1980). In the analogous situation in which resolution of a non-fee claim makes consideration of a fee claim unnecessary, the court in its discretion may allow an award. *Maher v. Gagne*, 100 S.Ct. at 2576 & n.15; *Oldham v. Ehrlich*, 617 F.2d at 168; *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423, 426-27 (8th Cir. 1978).

School desegregation cases invariably involve multiple parties and multiple issues. It is usually impossible to determine in advance of trial which issues will be reached or which parties will play pivotal roles in the course of the litigation. To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties. "The complex nature of school desegregation cases requires that attorneys' fees be approached with flexibility if Congress' goal in enacting these statutes is to be realized." *United States v. Waterbury Bd. of Educ.*, 605 F.2d 573, 576 (2d Cir. 1979).

In this case there was a substantial likelihood that Initiative 350 would be held constitutional. In that event the considerable burden of litigating whether the school districts involved were unconstitutionally segregated would have fallen squarely on the intervenors. Because an award of attorney's fees in this case is essential to effectuate the congressional purpose of encouraging future constitutional litigation in similar circumstances, we conclude that the District Court abused it discretion in denying intervenors' attorney's fees.

The judgment on this issue is reversed and upon remand, the District Court will determine the amount of the award. The award should include not only compensation for time spent on the Phase II issues, but at least some award for time spent monitoring the Phase I litigation. The intervenors could not have effectively litigated Phase II issues if they had not had at least some

familiarity with the proceedings on Phase I issues.

Affirmed in part; reversed and remanded in part.

EUGENE A. WRIGHT, Circuit Judge, dissenting:

The issue in this appeal is whether Initiative 350 violates the Fourteenth Amendment. The initiative was adopted overwhelmingly, passing in each of the 39 counties, and had a statewide affirmative vote in excess of 65%. By enacting the law, Washington's voters chose to adopt a neighborhood schools policy, and to limit the use of mandatory busing as a means of desegregating schools.

It is not our function to assess the wisdom of that choice. We must decide only whether the choice was constitutionally permissible.

We need not determine at this stage of the litigation whether Seattle or any Washington school district operates or maintains a *de jure* segregated school system. The initiative expressly refrains from interfering with constitutionally mandated remedial actions. To date, no court has said that any Washington district operates a dual system.

In the absence of a duty to desegregate, I find no constitutional barrier to the voters' adoption of a neighborhood schools policy. Although the choice made by the voters may have been controversial, it was not one they were precluded from making.

The district court held Initiative 350 unconstitutional on three alternative grounds. The majority, adopting one of the district court's arguments, holds that, because the initiative contains a racial classification which is not necessary to achieve a compelling state interest, it is unconstitutional. After considering the majority's analysis, I shall add my views as to the other two grounds articulated by the district court.

I

The majority finds a racial classification in Initiative 350 because it prohibits student assignments beyond the next nearest school in order to obtain racially balanced schools, but allows such assignments for other reasons. It relies on *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21

L.Ed.2d 616 (1969), and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D. N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), for the proposition that the state creates an "explicit racial classification" insofar as it "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." Maj. op. at 1344.

Finding a racial classification, the majority perceives no need to inquire into the purpose or intent behind Initiative 350. Instead, it proceeds immediately to the question whether the classification is necessary to achieve a compelling state interest.

Although recognizing a state interest in a neighborhood schools policy, the majority finds that interest subordinate to the interest of local communities in promulgating their own educational policies for public schools. It concludes the state's interest in neighborhood schools is not compelling and thus the initiative is unconstitutional.

A

In its recent decisions, the Supreme Court has emphasized that the touchstone of an equal protection violation is an intent to discriminate, *i.e.*, an intent to treat similarly situated persons differently.

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Court affirmed the central purpose of the equal protection clause is to prevent discrimination based on race. *Id.* at 239, 96 S.Ct. at 2047. It emphasized, however, that "a racially discriminatory purpose" was an essential element of an equal protection violation. *Id.* The Court specifically noted the application of this principle in school desegregation cases:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current

> condition of segregation resulting from intentional state action."

Id. at 240, 96 S.Ct. at 2047.

In the following term, the Court reiterated: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). In its most recent school desegregation cases, the Court has adhered to this principle. *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 97 S.Ct. 2166, 53 L.Ed.2d 851 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979).

The inquiry into intent can be avoided only if the challenged statute contains an explicit suspect classification:

> Certain classifications, * * * in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification. * * * This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. * * * But, as was made clear in *Washington v. Davis* * * * and *Arlington Heights* * * *, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979) (citations omitted).

My disagreement with the majority is that I do not believe Initiative 350 contains a racial classification. Rather, the initiative is a neutral law that must be analyzed in terms of its intent.

B

Initiative 350 does not treat persons differently on the basis of race. It does treat student assignments designed to obtain racially balanced schools differently than student

assignments for other purposes. In my view that is not a suspect racial classification.

The policy question, whether student assignments beyond the next nearest school should be used to overcome *de facto* segregation, is at the heart of the choice Initiative 350 presented to the voters. That question has little to do with the question whether such assignments should be permitted for purposes of special education or to avoid health and safety hazards.

Clearly, the problems of racial segregation and inequality are central to the former question. Mr. Justice Powell has noted the intensified debate over the educational benefits of integration. He has suggested the indisputable benefits of having young persons attend schools with diverse student bodies "often will be compromised where the methods employed to promote integration include coercive measures such as forced transportation to achieve some theoretically desirable racial balance." *Columbus Board of Education v. Penick*, 443 U.S. 449, 485, n.5, 99 S.Ct. 2941, 2991 n.5, 61 L.Ed.2d 666 (1979) (Powell, J., dissenting). *See Estes v. Metropolitan Branches of Dallas, NAACP*, 444 U.S. 437, 100 S.Ct. 716, 717, 62 L.Ed.2d 626 (1980) (Powell, J.) (dissent from denial of certiorari).

The Justice's comments suggest the nature of the question presented to the voters. There is no classification on the basis of race in resolving that question in favor of neighborhood schools, while permitting distant assignments for other purposes.

Moreover, the majority recognizes, as was found by the district court, that the legislative purpose of Initiative 350 was to adopt a neighborhood schools policy. We held recently that a neighborhood schools policy is not constitutionally suspect. *Diaz v. San Jose Unified School District*, 612 F.2d 411, 415 (9th Cir. 1979). It is inconsistent to hold now that the adoption of such a policy creates a suspect racial classification.[1]

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[1]The majority's reliance on *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), is misplaced. The majority suggests the Supreme Court held a state anti-busing

That holding is also inconsistent with the Supreme Court's school desegregation cases. The laborious inquiry into intent, *see Columbus* and *Dayton*, *supra*, could be avoided under the majority's analysis, by simply finding an explicit racial classification any time a school district bused students for special education or other reasons, while refusing to do so to desegregate its schools.

C

The majority's analysis ultimately turns on Initiative 350 being a statewide initiative. It states this is the "crucial fact," and suggests a different result had the neighborhood schools policy been adopted by local school boards. Maj. op. at 1345-1346 n.8. Indeed, it is clear that the Seattle School District could rescind the Seattle Plan without violating the Fourteenth Amendment. *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977).

It is not clear how the exercise of state power creates a racial classification here. The history of governmental attempts to deal with racial discrimination is replete with federal and state laws directing subordinate governmental entities not to take certain actions on the basis of race. Those laws do not contain explicit racial classifications. By addressing a problem involving a racial minority, the state does not create *ipso facto* a racial classification.

Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), does not support the majority's analysis. The Akron City Council had enacted a fair housing ordinance. The citizens of Akron subsequently by amendment to the city charter required any ordinance regulating the use or sale of real property on the basis of race to be approved by the voters before becoming effective. The amendment applied to the fair housing ordinance.

The Court did not hold that the repeal of the existing ordinance violated the Fourteenth Amendment. 393 U.S. at

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statute unconstitutional because it interfered with the discretion of school districts to adopt desegregation programs that are not constitutionally required. The opinion held the statute unconstitutional because of its interference with *constitutionally required* remedies.

390, n.5, 89 S.Ct. at 560, n.5. It held the charter amendment violated the equal protection clause because it subjected ordinances aimed at eliminating racial discrimination in housing to a more burdensome legislative process than other ordinances.

Initiative 350 in no way alters the legislative process in the State of Washington. It does not subject legislation sought by racial or other minorities to procedures more burdensome than those applicable to other legislation.

The difficulty with the majority's analysis, supported in part by dictum in *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971),[2] is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But "racial" problems, such as school desegregation, must be dealt with in terms of the specific problem and specific solutions. The state does not create a classification on the basis of race in so doing.

D

Initiative 350 is an exercise of the state's constitutional responsibilities in the field of public education.[3] The state constitution decrees that it is "the paramount duty of *the state* to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex." Wash. Const. Art. IX, § 1 (emphasis added). "The *legislature* shall provide for a general and uniform system of public schools." Art. IX, § 2 (emphasis added). *See Seattle School District v. State*, 90 Wash.2d 476, 518, 585 P.2d 71, 95 (1978) (state legislature has responsibility for organization, administration and operational details of elementary and secondary education).

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[2]*Lee*, like *Hunter*, involved a statute which differentiated the way in which measures were enacted depending on their content; the procedures for enacting measures benefiting a racial minority were more burdensome.

[3]The state constitution vests legislative authority in the legislature, but reserves to the people the power to enact bills independent of the legislature. Wash. Const. Art. II, § 3. An initiative, then, is an exercise of

In *Mandatory Busing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972), the Washington Supreme Court considered a challenge to a desegregation plan adopted by the Seattle School District and approved by the State Superintendent of Public Instruction. The court stated that a local initiative could not be used to overturn the plan:

> Initiative and referendum procedures can be invoked at the local level only if their exercise is not in conflict with state law. * * * Clearly they cannot be used to interfere in the management of *the state's school system.*

80 Wash.2d at 450, 495 P.2d at 661 (emphasis added) (citation omitted). It is ironic that a federal court would now hold that the state itself may not interfere in its own school system.

The majority's claim that "Initiative 350 effectively disenfranchises the voters of the local school districts" ignores the district court's finding that 60% of the voters in Seattle voted in favor of the initiative. In any case, a statewide, rather than local, initiative was required by *Palmason*. Its use does not, in my view, create an explicit racial classification.

II

The district court's second argument was that discriminatory intent was a motivating factor in the adoption of Initiative 350.

Proof of discriminatory intent must be gleaned from objective factors, several of which were outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68, 97 S.Ct. 555, 563-65, 50 L.Ed.2d 450 (1977): (1) discriminatory impact; (2) historical background; (3) specific sequence of events culminating in the decision; (4) departures from the normal procedural and substantive sequence; and (5) legislative and administrative history.

The burden is on the party challenging a statute to

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the state's legislative power. *See Love v. King County*, 181 Wash. 462, 469, 44 P.2d 175, 178 (1935) (passage of initiative is an exercise of same power of sovereignty as passage of a statute by the legislature).

prove that discriminatory intent was a motivating factor in its adoption. *Id.* at 265, 270, 97 S.Ct. at 563, 566.

The district court did find that "racial bias or racial motivation is a factor in the opposition to the 'busing' of students to attain racial balance." Finding of Fact 3.7. A two-fold response to this purported finding is necessary. First, there is insufficient evidence in the present record to support a finding of racial bias as to Initiative 350 under the standards developed by the Supreme Court. Second, any ultimate determination as to the presence or absence of discriminatory intent is a highly mixed question of law and fact, reviewable on appeal.

The district court based its finding of discriminatory intent on three factors. First, it found the effect of Initiative 350 would be racially imbalanced schools in Seattle, Tacoma, and Pasco. It found there would be a disproportionate adverse impact on minority students as a result of that imbalance. *See* Finding of Fact 3.1(a).

Second, it examined the historical background and sequence of events leading to the adoption of the initiative, and concluded it was intended to prevent implementation of the Seattle Plan (*i.e.*, racial balancing of Seattle schools by means of mandatory busing). For example, the court pointed to an unsuccessful recall election designed to remove members of the Seattle Board of Education who supported mandatory busing.

Third, the court considered Initiative 350 to be a marked departure from the "procedural norm," in that a local decision was overridden in a statewide initiative.

These factors do not support the district court's conclusion that a discriminatory intent was a motivating factor behind adoption of Initiative 350.

A

The underlying sociological and political assumptions equating quality education with integration have been questioned. *See* N. St. John, *School Desegregation Outcomes for Children* 136 (1975).[4] To the extent the district

[4]*See* Bell, *Book Review*, 92 Harv.L.Rev. 1826 (1979), and studies reviewed therein. *See also* D. Armor, *The Evidence on Busing*, 28 Pub.

court found the disproportionate adverse impact of Initiative 350 on minority students to be a "certainty," *see* 473 F.Supp. at 1015, its finding was clearly erroneous.

Moreover, the Supreme Court has consistently disavowed the proposition that foreseeable impact alone is adequate to prove intent. Additional indicia of discriminatory intent are required. *See Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973); *Columbus Board of Education v. Penick*, 443 U.S. at 464, 99 S.Ct. at 2950 (disparate impact and foreseeable consequences, without more, do not establish a constitutional violation). Discriminatory purpose "implies the decisionmaker * * * selected or reaffirmed a particular course of action at least in part *'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 279, 99 S.Ct. at 2296 (emphasis added).

B

The historical events cited by the district court are not probative of discriminatory purpose. Assuming that Initiative 350 was prompted by opposition to the Seattle Plan, there is no evidence in the record indicating that opposition to the Seattle Plan was in turn motivated by discriminatory intent. Indeed the district court specifically found that the backers of the initiative acted responsibly in their advocacy of the initiative and did not direct appeals to the racial biases of voters. Finding of Fact 7.27.

Accepting the findings that opposition to the Seattle Plan was the primary motivation behind Initiative 350, the record is devoid of evidence to conradict the state's contention that historical opposition to the Seattle Plan was motivated by race-neutral concerns. *See* Findings of Fact 7.30, 7.31, and 7.32. Absent this second linkage, the cited historical and sequential events are simply not probative in establishing discriminatory purpose in the subsequent enactment of Initiative 350.

Interest 90 (1972). *Cf.* J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation*, 1968-73 (1975) (concluding school desegregation a significant cause of white flight).

C

The concept of a procedural departure from the norm has not been clearly defined. No argument is advanced, however, that the proponents of Initiative 350 failed to follow proper administrative or statutory procedures for its enactment.

Washington voters have utilized the initiative and referendum devices extensively in recent years. *See* Comment, *Judicial Review of Laws Enacted by Popular Vote,* 55 Wash.L.Rev. 175, 179, n.29 (1979). Any procedural departure from the norm is of minimal probative value here, since it was required by a decision of the state supreme court. *See* §§ I-C & I-D, *supra.*

At best, the court is left with an inference of intent solely from foreseeable impact. While disproportionate impact on a racial minority may be highly probative of discriminatory intent, it is not a conclusive evidentiary factor. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. at 278, 99 S.Ct. at 2295. Plaintiffs have failed to sustain their burden of proof on this issue. The factual findings on intent do not establish that support for Initiative 350 or opposition to the Seattle Plan was motivated by discriminatory intent.[4A]

III

Borrowing from an analytical structure developed in the area of First Amendment rights, the district court invalidated Initiative 350 for overbreadth. I disagree.

The doctrinal basis of the court's conclusion is ill-defined. Traditionally, the overbreadth doctrine is applied when a possibility exists that a constitutionally protected activity may be "chilled". *See NAACP v. Button,* 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963) (enforcement of barratry law may be invalid if it prohibits exercise of First Amendment rights). It is a departure from the normal mode of constitutional adjudication, justified by the favored status of First Amendment rights to free

[4A] *See* Note, 55 Wash.L.Rev. 735 (1980) (concluding district court's opinion unsound in its inference of discriminatory intent solely from the decision to maintain a neighborhood schools policy).

expression and association. *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42, 84 L.Ed. 1093 (1940).

Variants or analogues of overbreadth scrutiny rarely have arisen in the adjudication of other preferred claims. *Compare Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (applying overbreadth doctrine and finding burden on Fifth Amendment right to travel) *with United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (invalidating section of same act for First Amendment overbreadth).[5] Courts have developed different methods of strict review to protect other preferred interests. *See generally* Comment, *The First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844, 852 (1970). Although similarities exist between equal protection scrutiny and the overbreadth doctrine, the latter should not supplant or supplement the former in its area of application.

Under equal protection analysis, labeling a classification as over-inclusive does not determine its compatibility *vel non* with the equal protection clause. Under- and over-inclusiveness must be viewed with reference to the means-end relationship. *Eisenstadt v. Baird*, 405 U.S. 438, 447-54, 92 S.Ct. 1029, 1035-38, 31 L.Ed.2d 349 (1972).

Appellees do not assert that the initiative impermissibly restricts First Amendment rights. Rather, they assert that is restricts a constitutional duty under the Fourteenth Amendment.

They cannot assert, however, that an affirmative duty makes their current desegregation plans constitutionally necessary, as there has been no determination, judicial or otherwise, of *de jure* segregation. It is their position that Initiative 350 could operate to inhibit or prevent busing remedies to remedy constitutional violations.

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[5]The Court in *United States v. Robel* declined to address Fifth Amendment arguments. 389 U.S. 258, 261, n.5, 88 S.Ct. 419, 422, n.5, 19 L.Ed.2d 508 (1967). It noted that *Aptheker v. Secretary of State* had been decided under the Fifth Amendment. 389 U.S. at 263, 88 S.Ct. at 423. *See also Aptheker v. Secretary of State*, 378 F.2d 500, 521 (Clark, J., dissenting) (distinguishing *Thornhill v. Alabama* and *NAACP v. Button* as First Amendment cases).

The record indicates that the framers and enforcers of Initiative 350 intended that it not interfere with a constitutional duty. This is reinforced by the language of the enactment itself. Section 6 provides:

> This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to public schools.

It is axiomatic that courts should endeavor to construe statutes in a constitutionally permissible manner. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973) (stating that court should not "destroy" a statute but should construe it to comport with constitutional limitations); *Lynch v. Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962) (interpreting statute to "free" it from constitutional doubts). Facial invalidation for overbreadth is an "extreme" remedy to be avoided if a constitutional construction is possible.

It is not only possible but expressly required that Initiative 350 be construed as not restricting a school district's performance of a constitutional duty to desegregate. The measure is not an "absolute prohibition" against student assignments for racial balance that would "inescapably operate to obstruct" federal court remedies. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 1285-86, 28 L.Ed.2d 586 (1971).

The statute here does not prohibit busing beyond the next nearest school when necessary to fulfill a constitutional duty. Initiative 350 subordinates its neighborhood schools policy to constitutional imperatives.

IV

Initiative 350 presented a sensitive policy issue to the voters. The issue is of special concern to minority groups. Yet absent prior constitutional violations or impermissible motives, I see no reason why the issue should be resolved by federal judges rather than through the legislative process. I would reverse and remand to the district court.

APPENDIX C

[filed August 29, 1979; Clerk's stamp deleted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C78-753 V
ORDER

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation, et al.,

Plaintiffs,

and

AMERICAN CIVIL LIBERTIES UNION; et al.,

Intervenor Plaintiffs,

and

EAST PASCO NEIGHBORHOOD COUNCIL, et al.,

Additional Intervenor Plaintiffs,

vs.

THE STATE OF WASHINGTON; et al.,

Defendants,

and

CITIZENS FOR VOLUNTARY INTEGRATION COMMITTEE (Ci.V.I.C.); et al.,

Intervenor Defendants.

Having considered the motion of Ci.V.I.C. that the Court make additional findings of fact, and the motions of the plaintiffs and of the plaintiff intervenors for the allowance of attorneys' fees and costs, together with the memoranda and affidavits filed in support thereof and in

opposition thereto, the Court now finds and rules as follows:

1. No memorandum was filed in support of Ci.V.I.C.'s motion that additional findings be made by the Court. The Court finds that good cause has not been shown as to why those additional findings should be made.

2. The allowance of attorneys' fees and costs in actions such as this is made discretionary with the trial court by the applicable statutes authorizing the award of attorneys' fees and costs. 42 U.S.C. § 1988; 20 U.S.C. § 1617.

3. The legislative history of the statutes authorizing the allowance of attorneys' fees and costs in actions such as this makes it clear that the allowance of attorneys' fees and costs was meant to encourage the private enforcement of civil rights and to encourage aggrieved individuals to act as private attorneys general. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Northcross v. Bd. of Education*, 412 U.S. 427 (1973). In the absence of any provision for the recovery of attorneys' fees and costs, private persons, even though grievously injured in the exercise of their civil rights, would hesitate to embark upon litigation which is almost always long, complex and expensive.

4. In the present case, however, this action was commenced not by private persons whose own civil rights had been violated but rather by three public bodies, the school districts of Seattle, Tacoma and Pasco. The financial concerns of these public bodies are hardly analogous to those of impecunious parents of school children whose civil rights may have been violated. Although the school districts do not have unlimited funds, they do, at least, have available to them public funds with which to prosecute litigation. The plaintiffs are to a very large extent financed by appropriations from the state. In part those appropriations are to defray administrative costs, including the legal expenses, of the plaintiff school districts.

5. With respect to the plaintiff school districts I find in the exercise of the discretion accorded to me by the controlling statutes that the legal expenses of the plaintiffs should not be shifted from them to the defendant state.

6. With respect to claims of the plaintiff intervenors,

this Court was very liberal in granting leave to intervene to those petitioning to do so. In freely granting leave to intervene, the Court considered the assertion by a number of the intervenors that there was *de jure* segregation of the schools of plaintiffs and that even if Initiative 350 were held to be constitutional, the alleged *de jure* segregation would require the intervention of this Court. The Court considered that if it should hold Initiative 350 to be constitutional, the plaintiff school districts could not represent adequately the contentions of those who were asserting *de jure* segregation since it was unlikely that the school districts would concede that there was *de jure* segregation in the schools of the plaintiff districts.

7. The Court finds that counsel for the plaintiffs adequately and ably represented the interests of the plaintiff intervenors with respect to the constitutionality of Initiative 350 and that the result would have been the same had the Court not permitted the intervention of any party prior to its decision as to the constitutionality of the initiative. Involvement of the plaintiff intervenors at this stage of the trial was not necessary to assure a fair and balanced presentation of plaintiffs' case. *Keyes v. School Dist. No. 1*, 439 F.Supp. 393 (D. Colo. 1977).

8. The Court finds that in the exercise of its discretion attorneys' fees and costs should not be awarded to the plaintiff intervenors as against the defandant state. If the judgment of this Court with respect to Initiative 350 should be reversed upon appeal, and if at trial plaintiff intervenors should prevail in their assertion that there is *de jure* segregation in plaintiff school districts, the Court will at that time entertain a motion by the intervenors for the allowance of attorneys' fees and costs.

Accordingly, the motion of defendant intervenor Ci.V.I.C. that the Court make additional findings of fact is DENIED; the motions of the plaintiffs and of the plaintiff intervenors for the allowance of attorneys' fees and costs are DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 29th day of August, 1979.

/s/_____
United States District Judge

APPENDIX D

[filed May 18, 1981; Clerk's stamp deleted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation; TACOMA SCHOOL DISTRICT NO. 10 OF PIERCE COUNTY, WASHINGTON, a municipal corporation; PASCO SCHOOL DISTRICT NO. 1 OF FRANKLIN COUNTY, WASHINGTON, a municipal corporation; BOARD OF DIRECTORS OF SEATTLE SCHOOL DISTRICT NO. 1, the elective governing body of Seattle School District No. 1; PATT SUTTON and JOHN SUTTON, each individually, and PATT SUTTON as Board of Directors member and as guardian ad litem for PHOEBE SUTTON, NICHOLAS SUTTON, JOSHUA SUTTON, and PATRICK SUTTON; RICHARD ALEXANDER and CONSTANCE ALEXANDER, each individually, and RICHARD ALEXANDER, as Board of Directors member and as guardian ad litem for REGINA ALEXANDER; CHERYL BLEAKNEY and THOMAS P. BLEAKNEY, each individually, and CHERYL BLEAKNEY, as Board of Directors member and as guardian ad litem for ROSS BLEAKNEY and SCOTT BLEAKNEY; DON OLSON and FRANCELLA OLSON, each individually, and DON OLSON, as Board of Directors member and as guardian ad litem for PETER OLSON; DOROTHY HOLLINGSWORTH, individually and as Board of Directors member; SUZANNE HITTMAN and DONALD HITTMAN, each individually, and SUZANNE HITTMAN, as Board of Directors member and as guardian ad litem for JOHN HITTMAN; T. J. and LYNDA VASSAR, individually and as parents and guardians ad litem for

MIKELLE VASSAR and ASHA VASSAR; ANNIE JONES, individually and as grandparent and guardian ad litem for CATRINA JONES and RENALDO JONES; HARRIET and WILLIAM WASSERMAN, individually and as parents and guardians ad litem for WAYLAND WASSERMAN and WYETH WASSERMAN; JONIS and CHARLES DAVIS, individually and as parents and guardians ad litem for JEFFREY DAVIS and RACHEL DAVIS; RICHARD L. and BARBARA D. ANDREWS, individually and as parents and guardians ad litem for CARMEN ANDREWS, LISA ANDREWS, and CHEYNEY ANDREWS; ANDRES and EVELYN TANGALIN, individually and as parents and guardians ad litem for MEI LIN TANGALIN, CELINE TANGALIN and MILES TANGALIN; BOB and ANITA SANTOS, individually and as parents and guardians ad litem for JOHN SANTOS and NANCY SANTOS; VIRGINIA and BYRON MARR, individually and as parents and guardians ad litem for ERIC MARR, CURTIS MARR, and PAMELA MARR; JOE and MONA JONES, individually and as parents and guardians ad litem for BRENT JONES and DANA JONES; MARY and JOHN CHARLES, individually and as parents and guardians ad litem for PAMELA CHARLES and ROBERT CHARLES; TAVALE and SARA TAUPULE, individually and as parents and guardians ad litem for SAGA TAUPULE; on behalf of themselves and alternatively on behalf of all citizens of the United States and all residents of the State of Washington who are similarly situated,

Plaintiffs-Appellees,

—VS—

THE STATE OF WASHINGTON; DIXY LEE RAY, Governor of the State of Washington; JOHN BAGNARIOL and JOHN A. CHERBERG, as principal officers of the legislative authority of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; FRANK B. BROUILLET, Washington State Superintendent of Public Instruction; H. EUGENE HALL; LEVY S. JOHNSTON; JACK L. REID; EDWARD DIAMOND; MARK E. HOEHNE; ROGER H. LINCOLN; WALTER H. LEWIS; JAMES M. SPALDING; OLLIE MAE WILSON; ORVILLE BARNES; GRANT L. ANDERSON;

EILEEN B. KALLES; PHILIP B. SWAIN; and ROBERT B. STOOKEY, each as members of the Washington State Board of Education,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that the State of Washington and the following state officers [either as heretoforenamed parties or as substituted parties pursuant to FRAP 43(c)]:

John Spellman as Governor of the State of Washington,

William Polk and Jeanette Hayner, as principal officers of the Washington State House of Representatives and Senate, respectively,

Kenneth O. Eikenberry as Attorney General of the State of Washington,

Frank B. Brouillet as Washington State Superintendent of Public Instruction,

H. Eugene Hall, Levy S. Johnston, Dale W. Thompson, Edward Diamond, Mark E. Hoehne, Roger H. Lincoln, Walter H. Lewis, Edward Armbruster, Ollie Mae Wilson, Roy E. Jorgensen, Grant L. Anderson, Robert N. Randall, Philip B. Swain, Margaret R. McCarthy and Lee Bailey as Members of the Washington State Board of Education,

do hereby appeal from the judgment in this case evidenced by the opinion of the Court of Appeals for the Ninth Circuit, originally filed on December 16, 1980, declaring Initiative Measure No. 350 to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, said judgment having been finally disposed of by order filed on March 26, 1981, denying Defendant-Appellants' petition for rehearing with suggestion for *en banc* hearing.

* * *

This appeal is taken pursuant to 28 USC § 1254(2).

DATED this 13th day of May, 1981.

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

/s/_____

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

AFFIDAVIT OF SERVICE
BY MAIL

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation; et al.,
Plaintiffs-Appellees,

—VS—

STATE OF WASHINGTON, et al.,
Defendants-Appellants.

STATE OF WASHINGTON)
: ss.
COUNTY OF THURSTON)

I, Linda C. Sandera, being first duly sworn, on oath depose and say: That I am, and at all times hereinafter

mentioned have been, a citizen of the United States, over the age of 18 years, and competent to be a witness in the above entitled case; that on the 14th day of May, 1981, I duly served one copy each of Notice of Appeal to the Supreme Court of the United States upon all counsel of record by enclosing said materials in an envelope addressed as follows:

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Attorneys at Law
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* * *

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said addresses being the last known post office addresses of counsel of record, by depositing the envelopes in the United States mail with correct first-class postage affixed thereto.

/s/_____
LINDA C. SANDERA

SUBSCRIBED AND SWORN to before me this 14th day of May, 1981.

/s/_____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia

AFF. OF SERVICE
BY MAIL

APPENDIX E

[filed March 26, 1981; Clerk's stamp deleted]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

D.C. No. 78-753

ORDER

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Plaintiffs-Appellees,

v.

THE STATE OF WASHINGTON, et al.,

Defendants-Appellants.

Before: ELY, WRIGHT, and NELSON, Circuit Judges

The judges constituting the panel originally concerned with the subject case (Ely, Wright, and Nelson) have voted unanimously to deny the Petition for Rehearing. Judge Wright has voted to adopt the suggestion for rehearing en banc, Judge Nelson has voted to reject such suggestion, and Judge Ely has recommended that the suggestion for en banc rehearing be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX F

(CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED)

Constitution of the United States of America

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution

ARTICLE IX
EDUCATION

§ 1 PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

§ 2 PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Initiative Measure No. 350 (Now codified in the Revised Code of Washington as shown below)

Chapter 28A.26

REQUIRING ATTENDANCE GEOGRAPHICALLY NEAR STUDENT'S RESIDENCE

28A.26.010 General rule——Exceptions. Notwithstanding any other provision of law, after December 7, 1978, no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances.

(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities [1979 c 4 § 1 (Initiative Measure No. 350).]

28A.26.020 Application of next geographically nearest rule. In every such instance where a student is assigned and transported to a school other than the one nearest his place of residence, he shall be assigned and transported to the next geographically nearest school with the necessary and applicable courses and facilities within the school district of his or her residence. [1979 c 4 § 2 (Initiative Measure No. 350).]

28A.26.030 Explanation of phrase as used in RCW 28A.26.010. For purposes of RCW 28A.26.010, "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student" includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: *Provided,* That nothing in this chapter shall limit the authority of any school district to close school facilities. [1979 c 4 § 3 (Initiative Measure No. 350).]

28A.26.040 Explanation of "special education, care or guidance" as used in RCW 28A.26.010. For the purposes of RCW 28A.26.010 "special education, care or guidance" includes the education, care, or guidance of students who are physically, mentally or emotionally handicapped. [1979 c 4 § 4 (Initiative Measure No. 350).]

28A.26.050 Voluntary options not precluded. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students. [1979 c 4 § 5 (Initiative Measure No. 350).]

28A.26.060 Adjudication of constitutional issues not precluded. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools. [1979 c 4 § 6 (Initiative Measure No. 350).]

28A.26.900 Severability——1979 c 4. If any provision of this chapter, or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to to other persons or cir-

cumstances is not affected. [1979 c 4 § 8 (Initiative Measure No. 350).]

Equal Educational Opportunities Act of 1974 (20 USC § 1701, et seq.)

EQUAL EDUCATIONAL OPPORTUNITIES

POLICY AND PURPOSE

§ 1701. Declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this part [20 USCS §§ 1701 et seq.] to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 1, § 202, 88 Stat. 514.)

§ 1702. Findings

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large

amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this title [20 USCS §§ 1701 et seq.] are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 1, § 203, 88 Stat. 514.)

UNLAWFUL PRACTICES

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency

of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title [20 USCS §§ 1712-1718], to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 204, 88 Stat. 515.)

§ 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 205, 88 Stat. 515.)

§ 1705. Assignment on neighborhood basis not a denial of equal educational opportunity

Subject to the other provisions of this part [20 USCS §§ 1701 et seq.], the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating studdents on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 206, 88 Stat. 515.)

§ 1706. Civil actions

An individual denied an equal educational opportunity, as defined by this part [20 USCS §§ 1701 et seq.] may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this title [20 USCS §§ 1701 et seq.] referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 207, 88 Stat. 516.)

§ 1707. Effect of certain population changes on certain actions

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a

desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 208, 88 Stat. 516.)

§ 1708. Jurisdiction of District Courts

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 207 [20 USCS § 1706].

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 209, 88 Stat. 516.)

§ 1709. Intervention by Attorney General

Whenever a civil action is instituted under section 207 [20 USCS § 1706] by an individual, the Attorney General may intervene in such action upon timely application.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 210, 88 Stat. 516.)

§ 1710. Suits by the Attorney General

The Attorney General shall not institute a civil action under section 207 [20 USCS § 1706] before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of subpart 2 of this part [20 USCS §§ 1703 et seq.]; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 211, 88 Stat. 516.)

§ 1712. Formulating remedies—Applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek

or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 213, 88 Stat. 516.)

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 215 [20 USCS § 1714];

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 215 and 216 of this part [20 USCS §§ 1714 and 1715].

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 214, 88 Stat. 517.)

§ 1714. Transportation of students

(a) No court, department, or agency of the United States shall, pursuant to section 214 [20 USCS § 1713], order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 215, 88 Stat. 517.)

§ 1715. District lines

In the formulation of remedies under section 213 or 214 of this part [20 USCS § 1712 or § 1713] the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and

had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 216, 88 Stat. 518.)

§ 1716. Voluntary adoption of remedies

Nothing in this part [20 USCS §§ 1701 et seq.] prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this part [20 USCS §§ 1701 et seq.] nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this part [20 USCS §§ 1701 et seq.], if such plan is voluntarily proposed by the appropriate educational agency.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 217, 88 Stat. 518.)

§ 1717. Reopening proceedings

A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, or an educational agency subject to a court order or a desegregation plan under title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000c et seq.] in effect on the date of the enactment of this part [20 USCS §§ 1701 et seq.] and intended to end segregation of students on the basis of race, color, or national origin, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 218, 88 Stat. 518.)

§ 1718. Limitation on orders

Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a

denial of the equal protection of the laws may, to the extent of such transportation, be terminated if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof. The court of initial jurisdiction shall state in its order the basis for any decision to terminate an order pursuant to this section, and the termination of any order pursuant to this section shall be stayed pending a final appeal or, in the event no appeal is taken, until the time for any such appeal has expired. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found not to have satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 219, 88 Stat. 518.)

§ 1720. Definitions

For the purposes of this part [20 USCS §§ 1701 et seq.]—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965 [20 USCS § 881(K)].

(b) The term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 [20 USCS § 881(f)].

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 401(b) of the Civil Rights Act of 1964 [42 USCS § 2000c(b)].

(e) An educational agency shall be deemed to transport

a student if any part of the cost of such student's transportation is paid by such agency.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 5, § 221, 88 Stat. 518.)

§ 1721. Separability of provisions

If any provision of this part [20 USCS §§ 1701 et seq.] or of any amendment made by this part [20 USCS § 1608], or the application of any such provision to any person or circumstance, is held invalid, the remainder of the provisions of this part [20 USCS §§ 1701 et seq.] and of the amendments made by this part [20 USCS § 1608] and the application of such provision to other persons or circumstances shall not be affected thereby.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 6, § 223, 88 Stat. 519.)

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act [20 USCS §§ 1701 et seq.] shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 251, 88 Stat. 519.)

§ 1752. Provision relating to court appeals

Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 253, 88 Stat. 519.)

§ 1753. Provision requiring that rules of evidence be uniform

The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 254, 88 Stat. 520.)

§ 1754. Application of proviso of section 407(a) of the Civil Rights Act of 1964 [42 USCS § 2000c-6(a)] to the entire United States

The proviso of section 407(a) of the Civil Rights Act of 1964 [42 USCS § 2000c-6(a)] providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV [42 USCS §§ 2000c et seq.], under all circumstances and conditions and at all time in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 255, 88 Stat. 520.)

§ 1755. Additional priority of remedies

Not withstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure

segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 256, 88 Stat. 520.)

§ 1756. Remedies with respect to school district lines

In the formulation of remedies under this title [20 USCS §§ 1701 et seq.] the lines drawn by a State subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn, or maintained or crossed for the purpose, and had the effect of segregating children among public schools on the basis of race, color, sex, or national origin, or where it is established that, as a result of discriminatory actions within the school districts, the lines have had the effect of segregating children among public schools on the basis of race, color, sex, or national origin.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 257, 88 Stat. 520.)

§ 1757. Prohibition of forced busing during school year

(a) The Congress finds that—

(1) the forced transportation of elementary and secondary school students in the implementation of the constitution requirement for the desegregation of such schools is controversial and difficult under the best planning and administration; and

(2) the forced transportation of elementary and secondary school students after the commencement of an academic school year is educationally unsound and administratively inefficient.

(b) Notwithstanding any other provisions of law, no order of a court, department, or agency of the United States, requiring the transportation of any student incident to the transfer of that student from one elementary or secondary school to another such school in a local educational agency pursuant to a plan requiring such transportation for the

racial desegregation of any school in that agency, shall be effective until the beginning of an academic school year.

(c) For the purpose of this section, the term "academic school year" means, pursuant to regulations promulgated by the Commissioner, the customary beginning of classes for the school year at an elementary or secondary school of a local educational agency for a school year that occurs not more often than once in any twelve-month period.

(d) The provisions of this section apply to any order which was not implemented at the beginning of the 1974-1975 academic year.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 258, 88 Stat. 520.)

§ 1758. Reasonable time for developing voluntary plan for desegregating schools

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 259, 88 Stat. 521.)

Civil Rights Attorneys' Fees Act of 1976 (42 USC § 1988)

42 USC § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil

rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

Elementary and Secondary Education Act of 1965 (Section 615, now codified as 20 USC § 3205)

20 USC § 3205. Attorney fees

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings

were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Apr. 11, 1965, P. L. 89-10, Title VI, § 615, as added Act Nov. 1, 1978, P. L. 95-561, Title VI, § 601(a), 92 Stat. 2266.)

Supreme Court, U.S.
FILED
DEC 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-9

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jurisdictional Statement Filed June 24, 1981
Probable Jurisdiction Noted October 13, 1981

JOINT APPENDIX

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(Continued Inside Back Cover)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-9

STATE OF WASHINGTON, et al., Appellants, v. SEATTLE SCHOOL DISTRICT NO. 1, et al., Appellees,	ERRATA SHEET

There should be included within the Relevant Docket Entries on pp. 1-7 the following, at the request of Appellees:

DATE	NR.	PROCEEDINGS
Dec. 5	10	Filed Pltffs memorandum in support of injunctive relief
Jan. 30	90	Filed motion of U.S. Dept. of Justice for leave to file brief for the U.S. as Amicus Curiae LODGED Brief for U.S. as Amicus Curiae LODGED Order
Feb. 9	100	Filed and entered Order granting U.S. leave to file brief as amicus curiae in support of pltffs position. Copy to counsel.
	101	Filed U.S. Brief as Amicus Curiae
Mar. 27	152	Memorandum of U.S. in support of
	154	Filed certificate of Atty General Griffin Bell

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Deputy Attorney General

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The Findings of Fact and Conclusions of Law and the Opinion of the District Court, the Court of Appeals' Opinion, and the District Court Order Denying Attorneys' Fees Are Reprinted as Appendices A, B and C to the Jurisdictional Statement, and Will Not Be Reprinted Herein.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
Nov. 30	1	Filed Complaint & issued summons.
Dec. 4	9	Filed and entered TRO.
Jan. 13	43	Filed Defts State of Washingtons ANSWER.
Jan. 25	68	Filed States Defts Brief in opposition to motion for Preliminary Injunction.
Jan. 25	70	Filed American Civil Liberties Union et al motion for apptment of Guardian Ad Litem for Minor Children and for leave to intervene.
	72	Filed East Pasco Neighborhood Council et al motion to intervene as pltffs.
		LODGED COMPLAINT in Intervention.
Jan. 26		Ent. CIVIC's motion to intervene as defts submitted w/o argument.
Jan. 31	80	Filed and entered Order GRANTING C.I.V.I.C.'s leave to intervene as defts.
Feb. 2	92	LODGED ORDER Granting motion for appt. of Guardians Ad Litem.
		LODGED ORDER Granting leave to intervene Amer. Civil Liberties Union, et al.
Feb. 7		LODGED Order to Intervene Re: East Pasco Neighborhood Council et al.
Feb. 9		Ent. Preliminary Injunction hearing had.
	102	Filed Order granting East Pasco Neighborhood Council et al leave to intervene. Copy to counsel.
	103	Filed order GRANTING American Civil Liberties Union, et al leave to intervene. Copy to counsel.
	104	Filed Order appointing Guardian Ad Litem, see order for details.
	105	Filed amended order cont. TRO to Feb. 14, 1979 at 12:00 or until further order of the Court. Copy to counsel.

Feb. 12	106	Filed Complaint in Intervention.
Feb. 14	107	Filed deft intervenors C.I.V.I.C. et al ANSWER.
Feb. 14	108	Filed and entered Order GRANTING Preliminary Injunction Pendente Lite. Copy to all counsel.
Feb. 14	109	Filed intervening pltffs East Pasco Neighborhood Council's Complaint in intervention.
Mar. 2	121	Filed ANSWER of C.I.V.I.C. et al to complaint in Intervention of East Pasco Neighborhood Council, et al.
	122	FILED Answer of C.I.V.I.C. et al to complaint in intervention of Amer. Civil Liberties Union et al.
Mar. 13		LODGED Pltffs' proposed Pretrial Order.
	133	Filed pltffs memorandum in support of proposed PTO.
Mar. 16		Ent. Pre-trial hearing had. Court signs Order appting Guardian ad Litem and Order concerning service. Apr. 23 Trial will be on the question of Constitutionality. Pltffs to propose finding with exhibits on or before Mar. 30, 1979 and defts on or before Apr. 13, 1979. Specific responses to new findings due on or before Apr. 20, 1979. Trial Briefs due on Apr. 16, 1979 and limited to 20 pages. Motion to disqualify is set for hearing Mar. 23, 1979 at 3:00 pm. Final Pretrial hearing set for Apr. 20, 1979 at 2:00 pm.
Mar. 23	142	Filed ANSWER of State defts to complaints in intervention of American Civil Liberties and East Pasco Neighborhood Council, et al.
Mar. 27	151	Filed motion of U.S. for leave to intervene as pltff-
		LODGED COMPLAINT

Mar. 29		Lodged Order Granting Leave to Intervene
Mar. 30	164	Filed State defts response to motion of U.S. for leave to intervene as pltff and/ or request for hearing.
	165	Filed pltffs proposed First set of findings of fact & conclusions of law — Initial Proposals.
Apr. 4	173	Filed Order Granting U.S. Leave to intervene as pltff.
	173A	Filed Pltff Intervenor U.S. Complaint in Intervention.
Apr. 13	211	Stipulated motion for dismissal of Deft. King County Prosecuting Atty.
	212	Filed and entered Stipulated Order and Jdmt of dismissal of Deft King County Pros. Atty. Copy to counsel.
Apr. 16	214	Filed Pasco Interv/Pltfs Trial Memorandum.
	215	Filed Pasco Interv/Pltfs suggestion of Lack of Jurisdiction.
Apr. 18	226	Int. Deft CIVIC et al's ANSWER to Complaint in intervention of U.S.
	227	U.S. Pretrial Brief.
	228	Trial Brief of State of Wash. defts.
Apr. 20	245	Pasco Intervening Pltffs motion to dismiss for lack of Jurisdiction.
Apr. 23	353	PROPOSED First Set of Findings & Conclusions.
Apr. 23		Ent. First day Court Trial, Vern Sorensen, exhibits.
	358	State Defts ANSWER to U.S. Complaint in intervention.
Apr. 24		Ent. 2nd day Court Trial, V. Sorensen c/r. Exbt's.
Apr. 25	362	Transcript of Proceedings, of Feb. 9, 1979 before Judge Voorhees.
	363	Transcript of Proceedings, of Mar. 16, 1979 before Judge Voorhees.

Apr. 25		Ent. 3rd day Court Trial. V. Sorensen C/R, exbts.
Apr. 26		Ent. 4th Day Court Trial. V. Sorensen Court Reporter, exbts.
Apr. 27		Ent. 5th Day Court Trial, V. Sorensen Ct. Reporter, exbts.
Apr. 30		Ent. 6th Day Court Trial, V. Sorensen Ct. Reporter, exbts.
May 1		Ent. 7th day Court Trial, V. Sorensen Ct. Reporter, exbts.
May 9	372	MEMORANDUM — pltfs in opposition to Pasco Interv. mot. to dismiss.
May 10		ENT. 8th day of Court Trial Joe Roth Ct. Reporter. Exbts.
May 11		ENT. 9th Day Court Trial, Vern Sorensen Ct. Reporter Exbts. Mr. Murphy to present order Re: scheduling for filing pleadings. Oral Argument set for Fri. June 15, 1979. Pltf. joins with Pasco Intervenor in motion to dismiss for lack of jurisdiction, motion taken under advisement.
May 23	374	ORDER — Regarding preparation of Post-trial briefs & submission of proposed findings & conclusions. Briefs all due June 8, 1979 and others May 29, 1979 and June 1, 1979. C to C.
	375	ORDER — Denying Pasco Interv. motion to dismiss claims of Pasco School District.
May 29	376	FINDINGS & CONCLUSIONS — proposed of Seattle Pltf Intervenors.
	377	FINDINGS & CONCLUSIONS — proposed of Pasco Pltf Intervenors.
		LODGED Pltfs Proposed Findings & Conclusions.
June 1	378	EXCEPTIONS — of Interv. Deft C.I.V.I.C. to Pltf proposed F & C.
		LODGED Intv. Deft CIVIC'S proposed

Findings & Conclusions.
LODGED State Defts Proposed Findings & Conclusions.

June 8 381 BRIEF — Post Trial of Sea. Interven. Pltfs.
382 BRIEF — Post Trial of Pasco Interven. Pltfs.
383 BRIEF — Post Trial of CIVIC et al Interv. Defts.
384 MEMORANDUM — Post Trial of Pltfs.
June 8 387 BRIEF — Post Trial of State Defts.
June 11 Ent. 10th day of Court Trial, Vern Sorensen Court Reporter. After hearing arguments of cnsl, the Court takes matter under advisement. Court advises cnsl that he will try to have his Opinion filed in the Clerk's office on or before Fri. June 15, 1979 by 2:00 p.m.
June 13 390 BRIEF — Seattle Urban League's Post Trial.
June 15 393 FINDINGS OF FACT & CONCLUSIONS OF LAW. Copies to cnsl.
394 MEMORANDUM OPINION — Court finds that Init. 350 Unconstitutional and grants pltfs motion for Permanent Injunction against enforcement. Copies to cnsl.
July 6 395 MOTION — pltfs for award of Costs and Attys Fees, and notice of mot. noted for July 27, 1979.
396 BRIEF — in support of.
397 AFFIDAVIT — of Camden Hall in support of.
398 AFFIDAVIT — of Michael W. Hoge.
399 AFFIDAVIT — of Elvin J. Vandeberg.
400 STMT. OF COSTS — & Disbursements to be taxed against defts.
July 10 405 MOTION — Intervenor Sea. Urban League for award of atty Fee's.

406 AFFIDAVIT — of Wm. Neukom in support of. & Notice noted for 7-27-79.
AFFIDAVIT — of mailing.

July 12 408 MOTION — Sea. Interv. Pltfs (except Sea. Urban League) for award of atty fees.

409 AFFIDAVIT — of Frederick L. Noland in support of.

411 MOTION — Pasco Intven. Pltfs motion for Atty Fees.

414 MOTION — Interv. Deft CIVIC for entry of add. Findings of Fact and notice of motion noted for July 27, 1979.

July 20 415 MEMORANDUM — of Intervenor Deft CIVIC et al Re: Award of Atty Fees.

416 MOTION — supplemental of Tacoma School District for award of costs and atty fees, with notice noted for July 27, 1979.

417 AFFIDAVIT — of Elvin J. Vandeberg in support of.

Aug. 17 429 BRIEF — Sea. Intervenor Pltfs in support of Atty fee's & costs.

431 MEMORANDUM — of Pasco Interv. pltfs in support of atty fee's & costs.

432 BRIEF — of U.S. in support of pltfs mot. Re: Atty Fee's & Costs.

433 BRIEF — St. defts Re: Atty fees and Costs.

434 AFFIDAVIT — of Joseph Taller.

435 AFFIDAVIT — of Maynard Mathison.

Aug. 18 436 AFFIDAVIT — (supplemental) of Wm. Neukom in support of Interv. Seattle Urban League for Atty fee's & costs.

437 BRIEF — of Sea. Urban League's mot. for atty fees & costs.

Aug. 24 Ent. Hearing on atty fee's had. Court Denies CIVIC's motion for additional Findings of Fact and DENIES motion

for atty fees. Court will prepare formal order on rulings.

Aug. 29 439 ORDER — Denying deft. Int. CIVIC's motion that the Court make add-findings of fact and DENYING motions of pltfs & pltf intervenors for atty fee's and costs. Copy to cnsl.

440 DECLARATORY JUDGMENT — Court findings that Int. 350 is unconstitutional and Permanent Injunction granted against enforcement. Copy to all cnsl.

Aug. 31 441 TRANSCRIPT OF THE COURTS ORAL RULING — before Judge Voorhees Fri. Aug. 24, 1979.

Sep. 15 442 TRANSCRIPTS OF PROCEEDINGS — before Judge Voorhees, Vern Sorensen Court Reporter, Vol. I, Apr. 23, 1979, (443) Vol. II of Apr. 24, 1979, (444) Vol. III of Apr. 25, 1979, (445) Vol. IV of Apr. 26, 1979, (446) Vol. V of Apr. 27, 1979, (447) Vol. VI of Apr. 30, 1979, (448) Vol. VII of May 1, 1979, (449) Vol. VIII of May 10, 1979, (450) Vol. IX of May 11, 1979.

Sep. 19 451 NOTICE OF APPEAL — deft State of Washington. Copy to C of A. Ent. Notice of pmt of dckt fee, and certificate of record sent to C of A.

Sep. 24 452 NOTICE OF APPEAL — intervenor defendants C.I.V.I.C. Copy to C/A. Notice of payment of docket fee mld C/A.

Sep. 28 453 NOTICE OF APPEAL — pltfs Sea. School District Copy to C of A & notice of pmt of docket fee.

Oct. 17 454 NOTICE OF APPEAL — Seattle Intervenor pltfs.

455 NOTICE OF APPEAL — East Pasco Neighborhood Council et al.

456 AFFID. — of service.

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION (Clerk's Records 440)

This matter came on for trial before the undersigned judge of the above-entitled court. The issues have been duly tried and a decision has been duly rendered.

It is therefore ORDERED and ADJUDGED:

1. **Declaratory Judgment.** Initiative 350 is declared unconstitutional in that it denies equal protection of the laws to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:

(a) It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race. No compelling state interest justifies that racial classification.

(b) A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative.

(c) It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation.

2. **Permanent Injunction.** Because Initiative 350 is violative of the United States Constitution, defendants The State of Washington; Dixy Lee Ray, Governor of the State of Washington; John Bagnariol, Duane L. Berentson and John A. Cherberg, as principal officers of the legislative authority of the State of Washington; Slade Gorton, Attorney General of the State of Washington; Frank B. Brouillet, Washington State Superintendent of Public Instruction; H. Eugene Hall, Levy S. Johnston, Jack L. Reid, Edward Diamond, Mark E. Hoehne, Roger H. Lincoln, Walter H. Lewis, James M. Spalding, Ollie Mae Wilson, Orville Barnes, Grant L. Anderson, Eileen B. Kalles, Philip B. Swain, and Robert B. Stookey, each as members of the Washington State Board of Education; in-

tervenor defendants Citizens for Voluntary Integration Committee (Ci.V.I.C.), Peter King, Sandra King, Rodney Dahley, Gwen Dahley, Thomas Bates, Phoebe Bates, Robert Liddell, Jr., Paulette Liddell, George King and Sally King; and all persons acting under, in concert with, for or on behalf of the defendants, including their instrumentalities, agents or employees, are permanently enjoined from engaging in, committing or performing or causing to be done, directly or indirectly, any acts which implement, enforce or attempt to implement or enforce the provisions of Initiative Measure No. 350 offered to and voted upon by the people of the State of Washington on November 7, 1978 which, *inter alia*, purported to prohibit public educational authorities in the State of Washington from assigning students to other than their nearest or next nearest school — with limited exceptions.

3. **Costs and Attorneys Fees.** This court reserves jurisdiction to tax and apportion the costs and attorneys fees in this matter by subsequent order.

DATED this 29th day of August, 1979.

/s/_____
Donald S. Voorhees
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM TESTIMONY OF CHERYL BLEAKNEY
(Tr., pp. 81-95)

* * *

Q. Mrs. Bleakney, would you define for us segregation?
A. It is defined — I refer to the definition that the School District uses, and uses the words racial imbalance rather than segregation.

To my way of thinking, segregation means the isolation of minority children in particular, because that's what the courts concerned themselves with within a school system.

Q. In other words, you do equate segregation with racial isolation in the context of schools?

A. Yes, sir.

Q. Let's go through that Seattle School District formula, this definition.

As you earlier testified, the definition of racial imbalance that the School District has adopted is that, when the combined minority population of any school, any individual school, exceeds by greater than 20% the district wide average combined minority population, that that school is racially imbalanced?

A. That's right. You said it better than I did.

Q. Is that school isolated in all cases?

THE COURT: Do you understand the question?

THE WITNESS: I am not sure I do.

THE COURT: I am afraid I don't understand the question.

Q. (By Mr. Murphy) Let's take the assumption you expressed. You gave as a definition the application of that formula that, if the district-wide average combined minority population was 25%, that a school with 45% minority population would be racially imbalanced, according to the School District's definition.

Would students, the minority students, in the school which is 55% white, be isolated from the white community?

A. Not within that context, Mr. Murphy. I think part of what we are working with is a legal context and an educational context, and a moral one. The School District has not attempted to define majority isolation. I believe it exists and I think it probably is detrimental for white children; but it has not become a legal issue, and therefore we haven't addressed it.

Q. I still didn't hear an exact answer to my question. Would a minority student in a school in which 55% of the population was white be isolated from the white community, from a white school?

A. I believe I said I don't think so, in that context; but, I think, in a legal context, it could well be so.

MR. MURPHY: Let's let Judge Voorhees handle the legal context, okay?

MR. HALL: I object to his cutting off the answer.

THE COURT: I don't think he cut off the answer. I think he commented upon it. I will ask you not to comment upon it.

MR. MURPHY: The next time I will move to strike it.

Q. Now, that isn't the case in Seattle; the combined minority population is greater than 25%.

A. That's correct.

Q. I think you testified it was approximately 37 percent?

A. This year.

Q. And that is close enough to the actual figure for our purposes here?

A. (Witness nods head.)

Q. Under the Seattle formula, then, when any school reaches 57 percent combined minority population, that school is a segregated school under the Seattle definition, isn't it?

A. That is correct.

Q. And, again, in rough terms, that still means that the minority student in that school gets to associate — every school today, you know — of ten students that a minority student gets to associate with in that school every day, four of those students are white, a little better than four actually, isn't that right?

A. Yes, by our figures.

Q. Do you believe that that minority student, 40 percent plus of the students he associates with every day are white — do you believe that minority student is isolated from the white community?

A. I think he can be, and I think there has to be a sense of equity, and a representation of the total community within that school. Without some numerical figure, I don't know what — at what point you decide a child is isolated.

Q. Well, you have decided for the school, for the students

of the school district, haven't you, at what point that child becomes isolated?

A. That is correct.

Q. Are you calling into question the Board's own judgment now?

A. No, but as I think I said, originally when we made the decision it was based on legal considerations and educational considerations.

Q. What were those legal considerations?

A. We had a good deal of advice from our attorney as to what H.E.W. would accept, what the courts would have used, what has been traditional throughout the United States on what has constituted an acceptable level for desegregation. Some courts have insisted that the student body in every school reflect the precise proportion of minority students that exist in the district. This, to us, was not acceptable.

We were particularly concerned about the numbers of minority races that we had and scattering them throughout the city, so they had no racial identity.

We admittedly struck a compromise, which was based on having to have something that would, in the opinion of our attorneys, and in our opinion, satisfy legal requirements, and it would also satisfy our need to protect our different ethnic groups and the children in our school district.

Q. In the legal requirements that you were attempting to satisfy, the legal entanglement that you were attempting to avoid, were entanglements from direction of the federal government or private individuals or interest groups here in the Seattle area, were they not?

A. Could you rephrase that, Mr. Murphy?

Q. You were afraid you were going to be sued?

A. Yes.

Q. You were threatened with suit, in fact?

A. Yes.

Q. The suit was coming either from the United States or

from private groups, the Seattle Urban League, the N.A.A.C.P., et cetera, isn't that right?

A. Yes.

Q. So, that you adopted a plan and adopted a formula, a definition of the racial imbalance or racial desegregation, which was designed to avoid that lawsuit?

A. It was designed to withstand a lawsuit in case we were hauled into court.

Q. And the reason it was designed or reason it was chosen with a view in mind that it would withstand any lawsuit was because it was an acceptable formula and an acceptable definition of racial imbalance by one of the prospective plaintiffs in that suit against you, wasn't it?

A. I am afraid you would have to explain that question. I don't —

Q. Let's step back a little bit. You earlier testified on direct examination that the School District adopted its own formula?

A. Yes, sir.

Q. Didn't, in fact, the School District adopt H.E.W.'s Office of Civil Rights formula?

A. No, sir. I participated and was chairman of the desegregation committee that met and tried to develop a proposal, which included myself, Mrs. Hollingsworth, and Mrs. Hittman. We met with legal counsel. We had a number of proposals of other Board members, from Dr. Moberly, as I recall, and from the district wise Advisory Commission. We looked at all of them and from this came out with what was essentially a compromise, which our attorneys advised us probably — not with any certainty — could withstand objections of H.E.W. or a court test.

The imposition of 50 percent of the single minority requirement in that definition came out of our committee and had been used by a prior board. There was a discussion at the Board meeting that day, we adopted the definition, and I believe a motion which would have tagged it to the district level, plus 25

percent, I believe. It was certainly not a foregone conclusion what that definition would be. I believe that vote lost by a three or four margin.

Q. I think what you just said is that there are quite a variety of views of what constitutes segregation and how to go about —

A. That's correct.

Q. And what constitutes integration in this country? The School District chose one of them, you will agree with that, won't you? Of educators and educational administrators, both in government agencies and in non school district government agencies and in the schools themselves, there are widely varying views as to what constitutes segregation?

A. Indeed there seems to be no definitive court rulings.

Q. As a matter of fact, you have been advised by the School District attorneys that the United States Supreme Court has never been able to adopt a numerical standard, has it?

A. That's correct.

Q. Was it ever called to your attention, Mrs. Bleakney by the District's attorneys, prior to your — I am excluding from the definition the formula, Seattle plan formula, for purposes of our plan here, the added factor of no greater than 50 percent of a single minority — was it ever brought to your attention by the School District attorneys that with respect to the 20 percent over the average district-wide combined minority population that that was, in fact, the Title 6 compliance standard in H.E.W.'s Office of Civil Rights proposed 1977 operating plan?

A. Not to my knowledge, it was not. And again I am trying to recollect events which were moving pretty fast. My recollection was that our attorneys advised us that the courts had accepted varying interpretations and probably that was the maximum number that any court would accept in the area of flexibility, and I may be wrong. We may have been advised about H.E.W.'s guidelines. I just don't recall.

Q. Do you recall being advised — when you said that that 20 percent was the maximum that a court was likely to accept, do you recall being advised that the Omaha School District used the plus or minus 15 percent?

MR. • HALL: Your Honor, maybe this is relevant, but I am not exactly sure what this quibbling as to the level of segregation is about. The fact of the matter is, the State Board of Education has adopted, in effect, what the Seattle School Board has adopted. The School Board has adopted something. The Court can make its own determination of what is segregation and what is not, but if we are going to roam about the United States and get all these divergent views, I don't know if it is very productive. I suggest it is really not relevant.

THE COURT: I am going to overrule the objection. You go ahead.

MR. MURPHY: It is the absolute guts of the lawsuit.

A. (By the witness) In going back to your question about Omaha, I had looked at the Omaha plan and did not even remember what the percentage was, but 15 percent about the district average was considered by our committee and by the Board. We also considered a varying scale. There was a number of options looked at.

Q. (By Mr. Murphy) But you were aware that there was, at least, one area in the country where less than 20 percent — less than 20 percent in excess of the formula was acceptable?

A. I think what I said, Mr. Murphy, was that 20 percent above was the maximum and I think we were looking for something that gave us the greatest flexibility possible, so that I think we were aware of the 15 percent.

Q. But you don't recall, as you sit here now, being advised that the United States Government, for Title 6 compliance purposes, was going to propose the 20 percent plus formula?

THE COURT: Ms. Green?

MS. GREEN: Your Honor, I am going to object to the repeated use of the United States Government as an exact standard of what constitutes racial desegregation.

THE COURT: I am going to overrule the objection. I think the witness has already stated that she may have been told that, but she doesn't now recall. Is that what you said?

THE WITNESS: Yes, that is correct.

MR. MURPHY: We can establish that independently.

THE COURT: That would be fine.

Q. (By Mr. Murphy) Just for the record, would you indicate to His Honor what Title 6 compliance means, what you and I are discussing in that area?

A. You wish to have me —

Q. I can do it for you, if you like. Just in general terms, what is Title 6?

A. It is equal rights aspects of the Equal Rights Amendment regarding race. Don't ask me to do the legal terms here.

Q. I think that you will be able to answer this. When H.E.W. finds a school district not in compliance with Title 6, the result is that you lose your federal funding, isn't it?

A. You go through a hearing which can involve losing your federal funding.

Q. If you lose the hearing and they find you aren't in compliance, and then if you lose the lawsuit, then the government is entitled to withhold those funds, isn't it?

A. Correct.

Q. And that was one of the uppermost concerns in the mind of the School Board, wasn't it?

A. I don't think so. I think it was — one of the concerns was the loss of federal funds. We felt — and, in fact, as was explained when we went out to the public, that there were concerns, educational, financial and legal. By the legal — the financial, we meant in large part the

possible loss of federal funds. The legal meant that we, even though we gave up our federal funds, we still could find ourselves in court as a result of findings of the O.C.R., and having to defend ourselves against the charges of deliberate segregation and possible take-over by a court. So, it was not just the loss of federal funds. We had, in fact, one Board member who had suggested at one point we should put an avid amount of money on the special levy to compensate for possible loss of federal funds in complying with desegregation goals.

Q. But that certainly was a serious concern of the School Board's, wasn't it?

A. Yes, it was, and as I said, I don't think it was the major one. I think the overriding one was the consequences of possible court action.

Q. But the formula the School Board chose was the formula that was designed to most likely insulate the School District from losing federal funds because of non compliance with Title 6 of the Civil Rights Act?

MR. HALL: I object. She has answered this question twice.

THE COURT: I think she has. I will sustain the objection.

Q. (By Mr. Murphy) If I could refer you to page nine of your written testimony, Mrs. Bleakney.

THE COURT: Would you refer her to the line.

Q. (By Mr. Murphy) Do you have the page?

A. Yes.

Q. Well, beginning on line 11, and even though you are talking there about the threat of lawsuits that the School District received — on line 15, you say that the N.A.A.C.P. charges, the complaint filed with H.E.W., are alleged acts of intentional segregation by the District?

A. Yes.

Q. Do you agree with that complaint? Did you think the School District was guilty of intentional or what we call de jure segregation?

MR. HALL: Your Honor, I object. This is not relevant to this phase. It gets into the de jure segregation.

THE COURT: Yes, I am going to sustain the objection.

EXCERPTS FROM TESTIMONY
OF EUGENE TONE
(Tr., pp. 375-377, 386, 387, 391)

A. Our definition is that any school that is more than 40% of one minority, or fifty per cent combined total minority, would be segregated.

Q. And what is the combined minority enrollment for the school district by percentage of student enrollment?

A. 20.7, as of last October.

Q. And, using the definition of segregated school, or racially-imbalanced school, at the present time, are there any schools within the Tacoma School District that are segregated or racially imbalanced?

A. There are none.

Q. Could you give us the essentials of the desegregation plan in effect in Tacoma at the present time?

A. Okay. We have established magnet programs in those central elementary schools that are heavily impacted with minority population.

We control enrollment into those schools by application, and we do conduct an on-going and systematic counseling effort throughout the school district.

Q. Now, the counseling effort is for what purpose?

A. That is to create an awareness throughout the district of the opportunities that are available to those students; whether they are being informed of those magnet programs in the central area. Or on the other hand, whether they are looking at transferring students anywhere within the school district.

Q. Out of the central area?

A. Out of the central area, right.

Q. The names of those two elementary schools are McTarver and Stanley; is that right?

A. That's correct.
Q. What function does bussing play in the desegregation program?
A. It is a very effective tool, or vehicle, I should say, in getting people from one point to another. And it has been used, I think, very effectively and successfully in Tacoma by providing convenient and efficient transportation, sometimes within a block or two of a child's home. In fact, that is the rule, I should say, within a block or two.
Q. You did not operate a bus system — the school district does not operate its own bus system, does it?
A. No, it is Tacoma Transit.
Q. And the students are provided passes for utilizing that system?
A. That's correct.
Q. With reference to the balance of the school district, other than McTarver and Stanley, what is the plan for enrollment at the various schools?
A. Well, we have optional enrollment district wide, which permits students to select any school in the school district if in fact space is available and it will not in any way disrupt the requirements of racial balance or desegregation.
Q. Would you please examine Exhibit Number 99, which you have been provided?

Do you recognize that as the written statement of the testimony that you prepared for this trial?
A. Yes, I do.
Q. And, to your knowledge, are the statements made therein true?
A. Yes, to my knowledge.
Q. And the opinions that are expressed therein are also your opinions are they not?
A. That's correct.
Q. Exhibit T-1 through T-15 to the exhibit are copies of resolutions from the board of directors, true and correct copies of the resolutions of * * *
Q. I would like to turn to another aspect of the computer

project, and the Tacoma School District's segregation program generally.

I believe your statement makes it clear that the Tacoma School District has worked in recent years, at least, on a goal of having no school with more than 50 percent minority population, is that a fair statement?

A. That's true.

Q. Now, in November of last year — I believe in November, perhaps it was in October — the State Board of Education established a new guideline, so to speak, for determining racial imbalance. Do you know what that guideline was?

A. Yes.

Q. What was it?

A. Well, I know in part what it is. It did state that when the combined total enrollment of a school district — whatever that minority enrollment is, you can add — you took the district average, the combined total minority enrollment, and then you add whatever your district enrollment is to that.

For example, if we had an average district enrollment of — I said, what, 20.7 percent. That means that we could add 20 percent to that and that would then determine whether a school was segregated or not segregated; I guess on that basis.

THE COURT: That would be, then, 20 percent more than the average minority enrollment of your particular district?

THE WITNESS: The combined minority enrollment, right. * * *

Q. And that is the basis on which you make that conjecture?

A. Yes, I think — yes. I would think that over the years — I think that we have had that kind of unique relationship with our community.

Q. I can't recall exactly where it is in your statement, however, but it seems to me that you acknowledge that most of the people with whom you come in contact in your work, most of those parents favor neighborhood

schools?

A. That is true.

Q. That is true?

A. I would say 95 percent; 90, 95 percent.

Q. And Initiative 350, as I recall, passed in the City of Tacoma, did it not?

A. Yes.

EXCERPTS FROM TESTIMONY
OF DAN R. HIXENBAUGH
(Tr., pp. 495-498, 505, 506, 509-511)

* * * Someone in the agency realized that chess is basically a game of color, and part of our guideline and direction was to completely avoid any such issue and it was discussed in the agency that that was sort of a minor point, but in chess being a game of color — as that was a directive, the idea of the concept was never presented for consideration.

Q. Turning to a document that has been marked as Exhibit A-117.

A. Yes.

Q. Does that appear also to be part of your deposition which Mr. Hall took of you and which he questioned you about?

A. It does.

Q. Turning to page 42 of that, Mr. Hixenbaugh, please, at line 8 — excuse me, 16. Could you read us your answer to Mr. Hall's question there?

The question was: "Do you recall any instructions from your client concerning any issue or approaches to advertising in the promotion of Initiative 350, which your client said should be avoided," and your answer, please?

A. "In our meeting, I think, the crux of what we were working towards is, we wanted to make sure the focus stayed on the dollar issues, stayed on the use of tax dollars, stayed focused on children and neighborhood schools, and what CiVIC considered to be the problem of bussing, and that we did not do something to turn it

really into a whole racial question of focus on that. That wasn't really considered relevant or really useful as an approach."

Q. Turning to page 46, Mr. Hixenbaugh, please, Mr. Hall asked you a question which started at the bottom of page 45, which was "In the discussion that you participated in, what was the reason for the feeling that the name" — we are referring to the name of CiVIC — "that the name had elements of undesirability. Why did you feel the name was inappropriate, if that is a fair conclusion?"

Did you feel that was inappropriate and would you give us your answer, please?

THE COURT: Let me go back a little bit further. I guess the question on page 44 was — and this is by Mr. Hall, I believe, is that right?

MR. OLIVER: Mr. Hall's question, Your Honor, starts at line 25 on page 44, and then the answer starts at line 5.

THE COURT: That question doesn't tell what the name is. Going back to page 44, the question is: "Did you ever discuss" — the previous question: "Do you know what the letters CiVIC mean?

"A. Citizens for Voluntary Integration Committee.

"Q. Did you ever discuss that with any representatives of CiVIC, the content of its name and the wisdom of the word integration in its name?"

Then, let's skip ahead to the question you are asking about.

MR. OLIVER: I tried to interpose what I was talking about.

THE COURT: Then we are going to page 45, line 20, is that correct?

MR. OLIVER: Forty-six, line 5.

Q. (By Mr. Oliver) Do you find that, Mr. Hixenbaugh?

THE COURT: And the question before that, immediately before that, was: "Why did you feel the name was inappropriate, if that is a fair conclusion.

Did you feel that it was inappropriate?" And then your answer.

A. (By the witness) The response here is — it seems to me there was a wide range of reasons. Just from the sound of it, just from the whole context, even as a name CiVIC, I don't think we agreed with. Focusing on voluntary integration we didn't think was the real focus of what we were doing or trying to do. It was sort of a misnomer. It brought up points that we were not addressing and that was confusing and we thought it was probably the only point in the whole thing that really came down to racial overtones, which is what we were really trying to avoid, and as a result, probably would hurt some of the support we were looking for by getting people or forcing people to misunderstand really what we were trying to do.

Q. Did initially CiVIC intend to — well, strike that. What was your initial proposal to CiVIC in terms of the campaign, the specifics; what you suggested to them to do in terms of where to put ads, what sort of ads?

A. That is sort of a broad question. Can you —

Q. Was the intent initially to campaign state-wide?

A. Yes, it was.

Q. Was it intended to campaign on TV state-wide?

A. Yes, it was.

Q. On the radio state-wide?

A. Yes.

Q. Newspaper state-wide?

* * *

REDIRECT EXAMINATION

BY MR. HALL:

Q. Isn't your job as an advertising person to package a product so that the people in the market to which your advertising is addressed will buy that product?

A. Yes, that's true.

Q. And isn't that what you were doing with regard to Initiative 350; trying to package it in such a fashion that the voting public would buy it?

A. That's true.

Q. And isn't that what you understood Exhibit A-30, the letter from Mrs. Jellen, to be telling you; to package this product in such a fashion as to present it so that people would buy it?

A. Along with the understanding for the agency to recommend how to package a product, you have to first understand what the product is.

The letter could really be Mrs. Jellen's idea of exactly what the issue is, and how they perceive it in defining the package to the agency.

I would say this is really the parameters of the beginning situation of how we start.

Q. This letter is dated February 16, 1978?

A. Yes.

Q. Was there even an initiative at that point? Do you know?

A. No, there was. The beginning of — it was beginning to pull together. This is why I say, this is not defining it.

Q. Was there a campaign at that time, in February of 1978, against the initiative, to your knowledge?

* * *

included about failure of bussing to desegregate. Did you have an understanding, or do you have an understanding of the significance of that construction?

A. I can see it here, at its face value.

Q. The next line talks about mandatory bussing fails to slow the flight of families. Do you have an understanding with regard to what that meant?

A. I do understand the sentence, yes.

Q. How does that relate to the Initiative 350 campaign?

A. I think it's an overview of the parameters of exactly what CiVIC is involved in. That is one of the details of.

Q. Two lines further down, it says, "I can't stress too much the necessity of avoiding any reference whatever to race." Do you see that reference?

A. I do.

Q. Do you have any idea why the issue of race was emphasized so much as something that should not be

included in the initiative campaign?

A. Yes. It should not be included in that, because it was not one of the points we were trying to stress, and would lose support.

Q. Would you say that you never stressed the issue of race in your advertising campaign?

A. Yes, I would.

Q. At the bottom of the page, Mrs. Jellen suggests: "Rather than 'mandatory bussing accelerates white flight from the city'," she said: "We can say 'passage of the initiative will give students options and help guarantee the high quality of education needed to keep families in the city.' "

Did you understand her suggestion to be a synonym or a code for the first, that is to say, in saying passage of the initiative will give students options, etc., it really means mandatory bussing accelerates white flight from the city?

THE COURT: I don't think it makes any difference how he interprets it. If it's relevant, it is for me to decide what the meaning is.

Q. (By Mr. Hall) You said, in your testimony, that references to race were not useful. I believe you used the words, "not useful"?

A. References to race were inappropriate.

Q. Do you recall using the words, "not useful"?

A. I suppose it's in the deposition.

Q. No, in your testimony today.

A. Okay.

Q. What do you mean by "not useful"? Useful for what?

A. Useful in gaining support for CiVIC.

Q. For CiVIC, or for the initiative?

A. For the initiative.

Q. When you said you were not to focus on race, and you talked about chess being a game of color, and children being used as pawns, in what way were children being used as pawns?

A. We felt that the whole point of bussing was not — the

emphasis of it was not on the quality of education and maintaining neighborhood schools for children, but was being surpassed for political issues, and we wanted to bring the whole issue of Initiative 350 down to the children, and quality education, and maintaining neighborhood schools.

Q. What political issues?

A. The other side of bussing the Seattle Plan.

Q. Desegregation?

A. Yes.

EXCERPTS FROM TESTIMONY
OF RICHARD SCHROCK
(Tr., pp. 526, 527, 538)

* * *

A. In general, I serve as a media consultant to a campaign committee, offering the campaign direction and at times coordination in its efforts to communicate through the mass media, be it through paid advertising, political advertising, or in its relationships with the news media.

Q. What is the purpose of — what ends are you trying to achieve in offering a client advice on how to approach the media problems surrounding a campaign?

A. I am simply trying to achieve voter approval or the required majority voter approval of a particular ballot issue.

Q. And in achieving voter approval, I take it your advice is offered in order to elicit positive voter response and avoid negative voter response?

A. Generally that's the case.

Q. Has your experience in this field, in the many campaigns you have been involved in since 1968, given you an ability to assess voter responses to certain controversial issues and hopefully predict ways to elicit that positive response?

A. Well, I would hope that might be the reason clients come to me, in that I have been in the field for a

number of years, and my opinions are based upon experience in the field.

We use fairly sophisticated techniques in trying to assess what voter attitudes are, as well as operating off of professional opinion.

Q. Is one of the reasons that clients keep coming back to you, is that your campaigns seem to be successful?

A. I hope so.

Q. Mr. Schrock, based on your general experience in the political campaign areas since 1968, and based on your experience with the issues surrounding Initiative 350, if you designed a campaign to appeal to racial motivation or segregative motivation of voters, wouldn't that campaign be successful in your opinion, in the State of Washington?

A. Not in the State of Washington.

MR. MURPHY: Thank you. That's all I have, Your Honor.

* * *

many of the sponsors of Initiative 350 were black. Indeed, wasn't the issue the fact that initiative 350 was multi-racial and multi-ethnic emphasized in their membership efforts?

A. You mean of CiVIC's membership efforts? CiVIC was interested in getting the broadest base coalition of people in this state to support this initiative, be they of any race, color or creed. We were interested in getting a good cross-section of the electorate, as a citizen's committee sponsoring the initiative, but we did not concentrate on any one particular ingredient, ethnically or racially, or anything else. We just went for across-the-board coalition.

Q. Why was CiVIC so interested in race?

A. I don't think CiVIC was that interested in race, since it was determined, I think by myself and concurred in by the CiVIC group that this issue would not be won or lost based on racial determinations of one sort or another.

If the issue of race arose, it usually came from outside of CiVIC. It usually came from the press, or from the opponents of the initiative.

EXCERPTS FROM THE TESTIMONY OF DR. JAY CHILDERS
(Tr., pp. 597-602, 604, 605, 612-641)

* * *

DIRECT EXAMINATION

BY MR. HALL:

Q. Dr. Childers, would you please give, for the record, your full name and spell your last name?
A. H. Jay Childers, C-h-i-l-d-e-r-s.
Q. And is the J in your name spelled out, J-a-y?
A. Correct.
Q. What is your residence address?
A. 4700 West Livingston, Pasco, Washington.
Q. By whom are you currently employed?
A. The Pasco School District.
Q. In what capacity?
A. Superintendent of Schools.
Q. How long have you had that position in Pasco?
A. I am just completing the 6th year in that position.
Q. Just a thumbnail sketch, what are the principal duties or responsibilities of the School Superintendent of Pasco?
A. The Superintendent is the chief executive officer of the School District, interpreting and implementing the policies established by the Board of Directors, and being responsible for the general conduct of the School District.
Q. Have you had an opportunity to review Exhibit 97, the document, the blue book to your left?
A. Yes, I have.
Q. And are the statements in that exhibit, to the best of your knowledge, true and accurate? * * *
Q. (By Mr. Hall) Do you incorporate the sentiments and

statements in Exhibit 97 as your testimony in these proceedings?

A. I do.

Q. Would you summarize for us, please, the situation — well, I call your attention to Exhibit 98. This might help in the summary. Can you identify what Exhibit 98 is?

A. Exhibit 98 is a map of the general area of Pasco; general area meaning specifically the city of Pasco, and contiguous suburban areas that apparently involve our elementary school service areas.

It identifies the general traffic, service boundaries, and the individual elementary schools.

Q. I notice that there are some red lines on the exhibit. What are those demonstrating?

A. Those are elementary school service boundaries.

Q. I notice in about the right-hand third of the exhibit there are some hatch marks, green cross marks, across the blue print line.

What do those green cross marks indicate?

A. That indicates a series of railroad tracks, probably eight or ten in number, which makes that area of town unaccessible except by one or two instances.

Q. I take it, as the Superintendent of Schools in Pasco, you are familiar with generally the locations of the city where people live?

A. I believe so. * * *

Q. In your statement, at page 3 of Exhibit 39, you describe the racial composition of your school district and divide the district into five categories, black, Asian, Native American, Hispanic, and Caucasian. With reference to the map of Pasco, Exhibit 96 —

A. Ninety-eight?

Q. Ninety-eight. Could you roughly describe, if this is susceptible to description, where a preponderance of the black, Asian, Native American, and Hispanic students in your district live?

A. All right. Beginning at the right-hand side of the map indicating the east area, all of the area east of the green

hatch marks is generally designated as East Pasco. The population in that area is somewhere between 92 and 97 percent minority. That is mixture of both black and Mexican American, highly transient kinds of people.

The next area moving west is the general service area of Captain Gray and Longfellow, particularly of a high incidence of residents who are minorities.

Generally speaking, then, as I think you have the data on minority enrollment by school, you will note that the minority enrollment as a percentage decreases as you go west in the school district. The four schools having the highest percentage of minority enrollment are those schools nearest the east end of the school district, Longfellow, Captain Gray, Emerson, and Robert Frost.

Q. Does the school district in Pasco have a plan which they are currently operating to seek the desegregation of its schools?

A. Yes, we do.

Q. Could you describe briefly what that plan is and how it works, perhaps with reference to the map, Exhibit 98, if that would be helpful?

A. The plan we first have — and maybe I ought to identify, in terms of definitions, it is a voluntary plan, in the sense that on the part of the district as a whole, it was adopted voluntarily and not as a result of court order.

The assignment of youngsters to schools is mandatory in the sense that a number of the youngsters — when we have a disproportionate balance in enrollment, we mandatorily assign youngsters.

I could give you a specific example of our eastern — western most elementary school, Livingston, which was opened this fall. We first went out and sought, through our home advisers, home liaison people, minorities that would voluntarily enroll in that new school. There are virtually no minority people who live in that school service area.

We did not get enough youngsters to result in a

respectable percentage of minority enrollment, and then we began to establish regulations which mandated that certain youngsters, minority youngsters would attend that school.

For example, we established that any kindergarten youngsters new to and who lived in East Pasco would automatically be enrolled at Livingston Elementary, clear out in West Pasco.

These, generally, then, in an effort to balance our minority enrollment throughout the district, are the kinds of tactics we used.

Much of the enrollment of minorities in the various schools is now voluntary, but initially, three or four years ago, when the older brothers and sisters of those youngsters began to go there in that school, they were mandated they would go there and develop a loyalty and it continues on.

So, trying to be very precise about our desegregation plan is difficult. It is an evolutionary type of process.

* * *

Q. Have you, as superintendent of your school district, reviewed the language of Initiative 350?

A. Yes, I have.

Q. And have you tried to come to some understanding, perhaps tentative, but nonetheless, some understanding as to what it means and what its application to Pasco would require?

A. To my best interpretation, it would appear to me that there is no provision for the Pasco School District being excepted from the effects of Initiative 350. Therefore, it would require our compliance.

Our compliance with Initiative 350, in my judgment, would result in, at least, those three easternmost elementary schools, Longfellow, Emerson, and Captain Gray having a minority enrollment exceeding 50 percent. This violates, then, regulations of the U.S. Office of Civil Rights, and it would further appear that there would be a good possibility that the Robert Frost

Elementary would also exceed the 50 percent enrollment.

Q. At the present time, they do not exceed 50 percent enrollment?

A. Longfellow Elementary is right at — about a student or two below 50 percent. The rest of them are somewhat lower.

Q. How long has Pasco had this desegregation plan which you described a few moments ago?

A. The plan first began in 1965.

Q. Prior to your tenure as superintendent?

A. Correct.

MR. HALL: Your Honor, we offer Exhibits 97 and 98.

CROSS-EXAMINATION

BY MR. BAETZ:

Q. Dr. Childers, with respect to Exhibit 98, the copy that I have, at least, does not appear to have a boundary line for the East Pasco area indicating, I believe, on the basis of your testimony, that it was not an elementary school service area.

Is my copy, or the copy I was looking at, simply mismarked, or is East Pasco not even in an elementary school service area?

A. That's correct, it is not located in an elementary school service area, and enrollment in that area is open.

Q. Basically that means that children from what otherwise might be a service area, are the ones that are bussed out?

A. That's correct.

Q. And distributed to the other schools in the Pasco system?

A. Yes.

THE COURT: I did not want to ask this question. You spoke about the children going to different areas. Are they bussed, or is the city or town — the city — small enough that they can walk to the various schools.

THE WITNESS: They are bussed.
THE COURT: They are bussed?
THE WITNESS: Yes.

Q. (By Mr. Baetz) And the students who are transported under this program are primarily members of a minority race or races, is that correct?

A. That's correct, insofar as the desegregation aspects are concerned. We transport and transfer other youngsters to effect classroom load balances, and this sort of thing.

Q. Has there been elementary school construction in Pasco since you arrived in 1973?

A. Yes.

Q. And is that the Livingston School that is shown at the far left, or the west side of Exhibit Number 98?

A. Yes.

Q. Is that the only elementary school that's been constructed since you arrived?

A. That is correct.

Q. Was that construction done in recognition of the fact that there was a student desegregation transportation program being carried out in Pasco?

A. Would you repeat the question, please?

Q. Was that construction of that school at its location done in recognition of the fact that there was a student transportation program, desegregation program, being carried out in Pasco?

A. Yes.

Q. So the newest school, that is, the Livingston School, was located at least in part with this 14-year-old desegregation program in mind?

A. Yes.

Q. It appears from the map, at least, Exhibit Number 98, that the Pasco School District has not located any new elementary schools in the neighborhoods where low income housing has been constructed.

Is that an accurate reading, or where low income housing exists?

Is that an accurate reading of Exhibit Number 98?

A. No. In the sense that there is low-income housing on

both sides of the railroad track, that is, in East Pasco, and in the eastern part of Pasco on the west side of the railroad tracks.

There are schools being served in that low income housing area, but that's not true in east Pasco.

Q. I understand that. In any case, there have not been any schools, new elementary schools, located in the east Pasco area?

A. That's correct.

Q. Now, on page 9 of Exhibit Number 97, there is a statement.

Do you have that document in front of you? Would you turn to page 9, please?

There is a statement — could I see yours for a second?

There is a statement under the paragraph headed 7, which states: "The selection of new school sites in Pasco School District — " strike that.

Four lines down, in paragraph 7, it says: "The newest elementary schools are in the neighborhoods where low-income housing has been constructed."

Is that an accurate statement?

A. No, it is not.

Q. Is it correct, Dr. Childers, that there have been no studies to your knowledge of where the newest schools would have been built, or should have been built, had there not been a student transportation program in effect in Psaco?

MR. HALL: Your Honor —

THE COURT: Yes.

MR. HALL: Does this relate to phase I of these proceedings, or phase II?

THE COURT: I am wondering about that myself.

MR. BAETZ: Your Honor, one of the portions of phase I, as I understand it, at least, is the effect — not whether there was de jure segregation in the past, but the effect of the implementation of Initiative 350, and one of the effects of implementation of Initiative

350 in Pasco may be the concentration of Students in locations where they would not have been located, but for the fact that transportation programs had existed for 14 years.

In other words, it is the position of Pasco intervening plaintiff, that an element to be taken into account in deciding what the effect of implementation of Initiative 350 would be, is the fact that there has been a program operating for 14 years in the past in Pasco, and the schools have been constructed in reliance upon that program and have been located in reliance upon that program, and to now adopt the provision of the nearest, next nearest provision of the initiative, and apply them to Pasco might put Pasco in the terrible position of having located its schools with one set of facts in mind, and now having another system forced upon them, which would make the segregation even greater.

THE COURT: How many questions do you intend to ask on that subject?

MR. BAETZ: Probably about two more. I have two more written down.

THE COURT: I will overrule the objection.

Q. (By Mr. Baetz) There have been no studies, to your knowledge, Dr. Childers, of where the newest schools should have been located if there had not been a student transportation program; is that correct?

A. I have difficulty answering that question.

Q. Do you know of any studies?

A. We have had, in the six years that I have been there, three studies projecting enrollment and housing patterns in the district. My difficulty — my problem in answering your question is the role of the district's bussing program in projecting future school housing needs.

Q. Let me ask the question another way:

Has there been any study, to your knowledge, as to where elementary schools, that elementary schools, or any other elementary schools would have been built

since 1965, and where it should have been built since 1965, if no student transportation program had been operating in Pasco?

A. I think I have to answer that question no.

Q. Would it be accurate to say that Pasco, the Pasco School District, at least to your knowledge and belief, may well have located new schools in different positions in order to enhance integration, had the student transportation desegregation program not been in effect in Pasco?

A. No.

Q. That is not an accurate statement?

A. No.

Q. You would have located the schools in the same location, to your belief?

A. I am not able to say where we would have located them.

Q. Would it be accurate to say you just don't know one way or another in that respect?

A. Yes.

Q. To your knowledge, Doctor, has there been any effort by the state, the county, or the federal government, or any governmental entity, to terminate the Pasco desegregation program?

A. No.

Q. Would it be accurate to state that no state officer, or attorney general, deputy attorney general, or other legal officer, has made any written or oral statements to you threatening to attempt to terminate the student transportation program?

A. That's correct.

Q. In fact, Doctor, is it accurate that no one, whether or not connected with any governmental agency, has made any such threat to you?

A. Such threat relating to what?

Q. To attempting to terminate your desegregation program?

A. Desegregation? No.

MR. BAETZ: I have nothing further.

THE COURT: Any further questions? You may step down, then.

Did you have further questions?

MR. MURPHY: Yes. I thought you were just talking about further direct.

THE COURT: No; any at all.

CROSS-EXAMINATION

BY MR. MURPHY:

Q. Doctor, referring to the map, which is Exhibit 98, you indicated that, since the opening of Livingston School, which is the westernmost school in the City of Pasco, elementary school, and that school only opened last fall, did I understand?

A. Correct.

Q. Since that time, the kindergarteners from the east Pasco area are bussed to the Livingston School?

A. Correct.

Q. So the youngest kids in the school system ride the bus the farthest, I take it?

A. No, that is not correct.

Q. Would you get out the map and explain to me — or you have the map in front of you — explain to me how that can't be true?

A. Because there is another, another elementary school not even shown on this map, twenty miles north, and some of those youngsters ride significantly farther than any of the youngsters we are speaking about in the area here.

Q. This map is not the — this isn't the whole Pasco School District?

A. No.

Q. There is another school, elementary school, 20 miles to the north?

A. That's correct.

Q. On this map. Are kindergarteners from the east Pasco area bussed 20 miles?

A. No, they are not.

Q. Who are the children that ride those 20 miles?

A. They are children who live on farms, some of them riding on the bus as far as 15 miles to that rural school, which is still their closest school.
Q. It is their neighborhood school?
A. I guess so.
Q. When they get on that bus in the morning, they do so voluntarily, don't they?
A. Voluntarily, in the sense —

MR. HALL: Just a minute. I think the witness ought to have an opportunity to answer the question.

THE COURT: Yes. Do you want to finish?

A. The point is, I have to answer your question no, because there are other kindergarten youngsters riding significantly farther than the youngsters in the area here, but I would further have to enlarge that by reason of space and by reason of special programs, there are some youngsters out 20 miles distant who are being bussed back to town.
Q. But not by reason of a mandatory reassignment program?
A. Yes.
Q. Okay. Why don't you explain that.
A. Because there is only one section of each grade in that school out there, and when the number of youngsters begins to reach 34 or 35, we mandatorily transport the next youngsters who come in back to town.
Q. Back to the nearest school which has the grade available to that youngster?
A. Yes.
Q. Do the school children or the parents of school children in East Pasco who are assigned to various schools in the eastern and western portions of Pasco get to pick and choose in any way as to which school they are going to be assigned, or are they just — apparently — let me just leave it that way. Does a parent in East Pasco get any say as to whether or not their child is going to go — excluding kindergarteners — as to whether their child is going to go to Longfellow or Mark Twain?

A. Yes, they do.
Q. How does that system operate?
A. It can operate by several means. They can have attended that school the previous year, and if they have done so, generally we consider that to be then their own neighborhood school.

The other alternative is that they might come in to the East Pasco neighborhood area and express a preference for Robert Gray Elementary School, for example, and if there would be space in that school at that grade level, we would honor their request.
Q. What about if there were space in Robert Gray at the elementary level, but Robert Gray was at the fifty percent minority level? Would you still honor their request?
A. We would not.
Q. So that once the school reaches the fifty percent, that is, combined number of minorities?
A. Yes.
Q. Once the school reaches fifty percent combined minority population, then the next kid in line does not have that school to pick from?
A. That's right.
Q. He may have a second alternative, but he can't pick that one any longer?
A. That's correct.
Q. Where does the figure fifty percent come from?
A. This, as I understand it, is a regulation of the U.S. Office of Civil Rights, and they designate a segregated area as a school whose minority enrollment exceeds fifty percent. Those are the guidelines we operate by.

MS. GREEN: Objection. Your Honor, I would like to see those regulations.

THE COURT: I am going to accept this as being his opinion. If you want to examine him on that, that would be fine.

MS. GREEN: Just his opinion and not the regulations from the Office of Civil Rights?

THE COURT: I will accept that as his stating

that at least it is his opinion that the fifty percent figure comes from the United States Office of Civil Rights. Is that —

THE WITNESS: Those are part of the directions we receive for meeting requirements under Title 1 and Title 7.

THE COURT: I will let you question him on that.

MS. GREEN: Now?

THE COURT: No, we will do it later.

Q. (By Mr. Murphy) What is the combined minority population of the entire district?

A. Including secondary students?

Q. The combined minority — yes, including secondary students and high school students.

THE COURT: This will be all students in the group?

MR. MURPHY: All of the combined minority population of the school district.

A. 26.63, according to the data on page 3 of my testimony.

Q. (By Mr. Murphy) So that I take it you wouldn't adopt the Seattle School Board or School District and the State Board of Education's guideline as to what constitutes a racially isolated school, that is if any school exceeds by — you understand?

A. Yes.

Q. You wouldn't adopt that definition?

A. No.

Q. Because that would identify a racially isolated school as any school that had 46 percent combined minority, wouldn't it?

A. That's my understanding, yes.

Q. Do you believe, Dr. Childers, that a school which is 50 percent white, that in a school which is 50 percent white and 50 percent minority, or 50.1 percent — let's put it that way —

A. Five.

Q. — and 49.9 percent white, are those minority students racially isolated?

A. You are asking my personal opinion?
Q. Yes.
A. No.
Q. Have you taken a look, or has the school district taken a look to see whether or not, given a higher definition of racial isolation, if you chose 60 percent, for example, any school which exceeded 60 percent combined minority population, has any thought or work been done on giving a higher definition of racial isolation, that when this 350 would still permit your plan of implementation of integration in the City of Pasco?
A. No.
Q. No such data. Has there been any discussion on the part of the Pasco School Board as to whether or not they should at least start thinking about raising their definition of a racially isolated school, in order to comply with the terms of the state law in the event it is rendered operative?
A. There has been discussion of it.

MR. HALL: Excuse me. Complies with the terms of which state law, because the State Board of Education has a state law which may become the state law.

I believe, with the Court's indulgence, I would like to know what the question means.

THE COURT: I assume 350, but you specify.

Q. (By Mr. Murphy) If 350 becomes operative and thus overrides any administratively adopted guideline of the State Board of Education —

THE COURT: You started to say the Board has talked about. Would you continue with that?

A. The difficulty is identifying from the various sources exactly what the requirements are and the definition of this sort of thing. Our district has operated under the assumption that the state's regulation formula used to be 40 percent, and the federal government's was 50 percent, and you use the 50 percent one and beyond that, no discussion has been held.
Q. There are many definitions of what constitutes racial

isolation in the context of the schools, aren't there?

A. That's correct.

Q. You have chosen one of them under circumstances, I take it, where you think there is a federally imposed requirement that you do so?

A. Yes.

Q. Can you tell us how many — let me put it this way: Pasco has what is called one way bussing, doesn't it? There are no majority students bussed, are there, mandatorily?

A. Not for purposes of desegregation.

Q. For purposes of desegregation there are no white students mandatorily reassigned?

A. Correct.

Q. I am sure there are many that ride the school bus?

A. Right.

Q. But they ride it to their neighborhood school. Have you taken a look to determine how many minority students are bussed beyond their nearest or next nearest school?

A. This is entirely dependent at the point in time when you are counting the students. I'm sorry. I don't mean to seem obstreperous. Each year at this time, every year, we have an influx of minority students. In the last three weeks, our minority enrollment has increased by probably between 3 and 500 students, and so — at what point in time do you want a number?

Q. Whenever the school was opened last September.

A. By our best estimate, at that time, we were transporting between 3 and 500 minority youngsters.

Q. Beyond their next nearest school or transporting a total of between 300 and 500?

A. We were transporting a total of between 300 and 500 and I do not have a figure better than that.

THE COURT: Was this for segregation purposes or desegregation purposes?

THE WITNESS: Yes.

THE COURT: Just that purpose alone, between 300 and 500?

THE WITNESS: Correct.

THE COURT: That is district wide, to all schools?

A. Yes.

Q. As far as you know, the school district, since the passage of 350, has not broken that down to determine how many of that, say, 300 minority students are assigned to a school which is beyond the next nearest school to their place of residence?

A. In my opinion it is not possible to do that, because we don't know what the next nearest school is.

Q. Why not?

A. If you will take a look at the map, you immediately have difficulty in identifying which is the next nearest school from a given location in East Pasco.

THE COURT: Is one of the problems — I think you said on the eight railroad tracks there are only certain places where you can cross those tracks?

THE WITNESS: Only two places of access.

THE COURT: Is that one of the crossings?

THE WITNESS: Yes.

MR. MURPHY: I think I see what he is talking about.

Q. (By Mr. Murphy) Dr. Childers, towards the bottom of the map, towards — just east of Longfellow School where there is a street — it looks like Lewis Street, does Lewis Street cross the railroad tracks?

A. Yes, it does.

Q. Okay. Then, the only other access, I take it, across from East Pasco to the western portion of Pasco is the freeway?

A. That's correct.

Q. So that your problem, I take it, is —

A. Actually, there is another crossing, and it is not identified, but it is — another line that runs approximately parallel to the Lewis Street. So there is a third, but that is an industrial area. There are virtually no children there.

Q. What are you telling me, then, if your problem?

A. Well, Longfellow would appear to be the nearest school to East Pasco. I am telling you, then, that I don't know whether Captain Gray or Emerson is the next nearest school. Is it as the crow flies? Is it by the nearest road? And these are some of the kinds of questions that Dr. Brouillet submitted in that list of questions he spoke to earlier today.

Q. Exercising your judgment as a, I believe, 24 year school teacher and school administrator, and being — and assuming you are a reasonable school administrator, what — using a reasonable man's standard, what do you think is the next nearest school to East Pasco?

THE COURT: Does he not have to take a particular student's residence?

THE WITNESS: That was the point I was going to make.

Q. Take the nearest residence in East Pasco to the railroad track and assume that Longfellow is the nearest school to that child's residence. What do you think a reasonable choice of the next nearest school would be?

A. I am sorry. I can't tell you. I am familiar with the geography, but I don't know which one is the closest.

Q. Turning to page 5 of your prepared statement, Dr. Childers, you have four numbered paragraphs there explaining what would — what Initiative 350 — that Initiative 350 would require the following actions to be taken, reassignment of students not currently attending the nearest or next nearest school from their place of residence.

Have you determined how many students would have to be reassigned and to what schools?

A. Not specifically. At best, we are able to estimate it would be probably between 3 and 500 youngsters.

Q. To shorten things up, your answer would be the same, I take it, for your paragraphs, 2, 3, and 4? Well, obviously not with 4, because it doesn't talk about reassignment.

A. I rather — in the case of number two, you would

reassign a number of youngsters, and you would then have a bumping effect. Youngsters reassigned, for example, to Captain Gray would result in displacement of youngsters currently attending Captain Gray, and they would, then, be bumped into the next nearest western school, and depending — our schools are virtually at maximum, so you have a bumping effect that might cause the displacement of any number of youngsters when you originally implemented 350.

Q. But you haven't tried to figure that out either?

A. No, we have not.

Q. Going down to the subheading "Problems created by Initiative 350," you said that "Three grade schools would become segregated, paren, minority enrollment exceeding 50 percent, close paren."

By how much would those three schools exceed 50 percent minority populations?

A. I'm sorry, I can't answer that.

Q. So you don't know whether or not they would, in truth, be racially isolated or not either, do you?

THE COURT: Isn't he saying that — let's see, that three would become segregated and you say minority enrollment exceeding 50 percent. Would he not have to know what you mean by "racially isolated"?

MR. MURPHY: He indicated earlier —

THE COURT: 51-49, he said, "No."

MR. MURPHY: If it is 90 percent —

THE COURT: Are we using that criteria now, 51-49? All I want to know is — is to have all of us thinking along the same lines.

MR. MURPHY: What I am trying to get at, because he doesn't know what the percentage of minority population would be in those three schools, he doesn't know whether, in his own personal view, any of those schools would be — any of the students in those schools would be racially isolated from the white population of the school district.

For example, if one of those schools were to be 95 percent minority, I think all of us would agree that

the students there would be racially isolated, but I think there would be strong argument among educators and other members in society if one of those schools turned out to be 62.1 percent — or 61.1 percent minority, as to whether or not those minority students were isolated from the white school community, and all I am asking is, that he can't make that judgment because he doesn't know what the percentages are.

THE COURT: Is that true?

A. (By the witness) That's correct.

Q. (By Mr. Murphy) In paragraph 2 you talked about one black grade school, two Hispanic schools and four white schools.

Again, we are at the elementary level here, right.

A. Yes.

Q. When you say one black grade school, are you saying that all of the blacks will be in one grade school, or are you saying that one grade school will have a black population exceeding 50 percent?

A. Would you again identify the source of that, please?

Q. It is paragraph 2, numbered paragraph 2 on page 5, under "Problems created by Initiative 350."

A. I see.

It is line 16 on that page.

THE COURT: Why don't we just — why don't you read it so that everybody in the courtroom will know what that paragraph is.

MR. MURPHY: "Persistence of racial separation in public schools (Initiative 350) will create one black grade school, two Hispanic schools, and four white schools."

Q. (By Mr. Murphy) What I am asking is, does that mean that you will have one elementary school in Pasco where all the black students attend, or does it mean that there will be one school in Pasco which — in which the black students will constitute more than 50 percent of the population in the school, or does it mean something else?

A. Okay. Essentially it is the latter suggestion you made,

that there would be one elementary school that would have a majority of black students; two elementary schools that would have a majority of Spanish students, and the rest would be Caucasian.

Q. Majority?

A. By my best estimates.

Q. But you don't know by what percentage the black students would constitute the majority in the one school?

A. No.

Q. Going over to page 6, Doctor, on line 5 of that page — this is your paragraph 11 of the list of things that you think would be — list of problems that you think would be created by Initiative 350.

You say, "Loss of one-half of Title IA Services for elementary school age children, in addition to 50 percent of the costs to the remaining Title I school; and possibly the loss of the entire Title IA program plus material, supplies * * * resulting in a complete loss of remedial programs in the district."

What do you base that fear on?

A. This advice came to me from our Director of Federal Projects, who has familiarity, whom I use as a source on these regulations, and he advised me that approximately half of our schools that are currently designated as Title I target schools would not become — would no longer be eligible, because of this excessive minority enrollment, and hence the reason for this statement.

Q. Has he advised you that some federal office, some speaking agent of the United States Government has threatened to pull those funds back if one of those schools hits 52 percent minority?

A. We are having problems right now because of enrollment of minority students in some of our schools.

Q. That is not what I asked, I guess.

A. Okay.

Q. Has your federal programs officer advised you that any officer of the federal government has said if you let — if you implement Initiative 350 we are going to cut off

your funds?

A. No.

Q. On line 10 of that page, paragraph 12, you say, "Title VII ESAA Services to seven schools in the area of counseling, language development, reading, and human relation development." That isn't the complete sentence.

What you are saying, I take it, is that you would lose Title VII ESAA Services?

A. I believe that is the type of services.

Q. Has any officer of the federal government threatened you or your federal program officer with the loss of those Title VII funds if you implement Initiative 350?

A. No.

Q. Upon what do you base your statement on line 13, paragraph 13, Doctor, that you would lose minority staff recruitment if Initiative 350 is implemented?

A. It is our experience in recruiting minority staff members that one of the first questions prospective candidates ask is if we in fact had a segregated or a desegregated school system. They began to talk and ask us questions about the system we utilize in desegregation, and we believe that this has an effect on their election to assign a contract in a school district or not.

Q. When those applicants ask you whether or not you have a segregated school system, do they say, "Dr. Childers, do you have any schools in your system in which the minority population exceeds 50 percent?" Or do they say, "Is Pasco committed to a policy of school desegregation?"

A. Well, I don't know which way they definitely ask the question. I think they just generally speak to a plan of desegregation.

Q. You don't know that your minority recruitment — recruitment program would come to a screeching halt if suddenly you found yourself with a couple of schools with 60 percent combined minority population?

A. I don't know that, no.

Q. Do you know whether or not that's true in any other school district in the state — in the country? Do you know of a school district in the country which has 65 to 70 percent minority population which cannot recruit minority staff members?

A. No, I know of no such school district.

EXHIBIT 9

DEFINITION OF RACIAL IMBALANCE AND 1978-79 AND 1979-80 PERCENTAGE GOALS RESULTING IN THE ELIMINATION OF RACIAL IMBALANCE

WHEREAS, the Board of Directors of Seattle School District No. 1 has found that the best interests of the children of Seattle School District No. 1 will be served by providing all school children with the opportunity for a quality multiracial education; and

WHEREAS, the Seattle School District has for a number of years worked to improve racial balance in the schools and to provide a multiracial balance in the schools and to provide the opportunity of a multiracial educational environment for all children during their educational careers; and

WHEREAS, the Board of Directors affirms its policy to work toward a multiracial educational system by whatever just, reasonable, and educationally sound means are available to it; and

WHEREAS, the Board of Directors is cognizant and appreciative of the strong and united community support for the above described efforts; now, therefore,

BE IT RESOLVED THAT:

1. The Seattle School District No. 1 will eliminate racial imbalance in Seattle Public Schools by the beginning of the 1979-80 school year. Any school exceptions, necessitated by unique program requirements, will only be for educationally sound reasons. These will be documented

and approved by the Superintendent on a case-by-case basis, and submitted to the Board for ratification.

2. Racial imbalance is defined as the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body.
3. Racial imbalance will be eliminated by the use of educationally sound strategies.
4. The elimination of racial imbalance will be planned and implemented so that at least one-half of the elimination occurs in the 1978-79 school year. During the 1978-79 school year, this goal will be achieved by eliminating racial imbalance in at least 50 percent of those schools identified as racially imbalanced; or by reducing racial imbalance by one-half in all schools identified as racially imbalanced; or by a combination of these measures.
5. The commitment and definition contained herein is controlling over other commitments and/or definitions which might be construed as inconsistent with this Resolution.

Adopted this 8th day of June, 1977.

/s/_____
Don Olson, President

/s/_____
Suzanne Hittman, Member

/s/_____
Patt Sutton, Vice President

/s/_____
Dorothy Hollingsworth, Member

/s/_____
Richard Alexander, Member

/s/_____
Ellen Roe, Member

/s/_____
Cheryl Bleakney, Member

ATTEST:_____
David L. Moberly, Secretary
Board of Directors
Seattle School District No. 1
King County, Washington

EXHIBIT 97

PREFILED WITNESS STATEMENT OF H. JAY CHILDERS

I have been Superintendent of Pasco School District No. 1 since 1973. I have been an educator for 28 years, receiving my bachelor's degree from Whitman College and my masters and doctorates from Washington State University. Prior to becoming Superintendent in Pasco I served as Superintendent in Snoqualmie Valley and Touchet, Washington, and as Assistant Superintendent in Eastmont and Kennewick, Washington. I make this Affidavit from my personal knowledge and from information made available to me in the ordinary course of business in my capacity as administrator for the Pasco School District.

BRIEF HISTORY OF DESEGREGATION IN PASCO

In 1943 the Energy and Research Development Administration, at that time known as the Manhattan Project, selected the Hanford site for the production of plutonium for the atomic bomb. The composition of the Pasco population in 1943 was predominantly white. Thousands of blacks from southeastern states began to arrive in the Tri Cities to work on the Manhattan Project at Hanford. At that time Richland was a government-owned town and under rigid housing regulations. Blacks were unable to find housing in either Richland or Kennewick.

Pasco, on the other hand, was a railroad town, and the availability of homes was greater. Blacks and other minorities began to move into the segregated East Pasco area, east of the railroad tracks. These railroad tracks still stand as a permanent demarcation describing East and West Pasco.

With the phasing out of the Manhattan Project and its successor, the U.S. Atomic Energy Commission, many individuals stayed and sought whatever work was available. As population increased, there began a trend of migration of whites to the West Pasco area, leaving much

of the former older housing isolated in what became known as the East Pasco Ghetto. New schools followed these population shifts, and as a result, one original school, Whittier, was left in East Pasco. This created a segregated school system.

In the spring of 1965 the Pasco School Board elected to close Whittier Elementary School. At that time approximately 150 black students in grades 1-6 comprised 93% of the Whittier School population. The closing of Whittier prompted a systematic plan for equalizing pupil distribution by race and by socio-economic background throughout the balance of the Pasco School System. A busing scheme was developed, and attendance boundaries were changed.

Throughout the years as enrollment has grown and new elementary schools have been constructed, this pattern of distribution of black youngsters, primarily from East Pasco, has been maintained.

In recent years, the District, because of agricultural development, has experienced significantly increasing numbers of Mexican-American youngsters attending schools in the District. These youngsters reside in either East Pasco or in the east portion of the downtown Pasco area. Deliberate efforts have been made to distribute these youngsters throughout the elementary schools in the District. This distribution of minority youngsters throughout the District has been accomplished by a system of busing. Attached to this affidavit as Exhibits A and B are a synthesis of the Pasco desegregation plan and pertinent sections from the School Board's adopted policies, respectively.

On October 1, 1978, the District's students had the following racial makeup:

Black	7.56%
Asian	.84%
Native American	.47%
Hispanic	17.71%
Caucasian	73.42%

The racial breakdown of elementary students

involved even higher percentages of minorities:

Black	6.79%
Asian	.92%
Native American	.72%
Hispanic	21.71%
Caucasian	69.86%

The minority students of the District are predominantly located in three specific sites in the District:

1. A mobile home court in the southeastern portion of East Pasco. Virtually all of the youngsters who come from this site are Mexican-American.

2. Low income housing units located directly in East Pasco. The population is about evenly divided between Mexican-American and black.

3. A low income housing development immediately across the tracts from East Pasco. The majority of the youngsters in this development are Mexican-Americans.

The Pasco District has seven elementary schools. Three would be predominantly white and three predominantly minority but for the assignment practices of the District which distribute minority students among all schools. Because the minority-area schools are on one side of town, and the majority-area schools are on the other, assigning students to the nearest or next-nearest school would not desegregate the system. Current minority percentages on the elementary schools are as follows:

Mark Twain	15.7%
Longfellow	50.0%
Livingston	15.3%
Gray	38.9%
Robert Frost	31.6%
Emerson	44.8%
Markham	12.9%

IMPACT OF IMPLEMENTATION OF INITIATIVE 350

Because of the geographic location of the minority student residency, and because of limited access to this area of minority residency, there is no way to effect

desegregation within the confines of Initiative 350. District staff have analyzed the affects of assigning students to the nearest or next nearest school. Implementation of Initiative 350 will require that the Pasco School District take the following actions:

1. Reassignment of students not currently attending the nearest or next nearest school from their place of residence.
2. Re-reassignment of elementary students to relieve overcrowding in schools caused by reassignment because of Initiative 350.
3. Re-reassignment of students to balance classroom loads among individual schools to comply with School Board policy.
4. Reorganization of bus routes to accommodate delivery of students from home to nearest or next nearest school.

PROBLEMS CREATED BY INITIATIVE 350

Among the deleterious effects of implementation of Initiative 350 are the following:

1. Three grade schools would become segregated (*minority enrollment exceeding 50%*).
2. Persistence of racial separation in public schools (Initiative 350 will create *one black* grade school, *two Hispanic schools*, and *four white schools*).
3. Destruction of climate of racial relations that has been established since 1972.
4. Creation of racial unrest in the secondary schools because of segregated elementary schools.
5. The quantity and quality of equal education opportunities will be undercut for students who attend segregated schools.
6. Local control of education will be diminished.
7. School officials are apparently prohibited from making educational changes in grade configurations even when the school population is on the increase.
8. Creation of negative working attitudes of minority staff.

9. Decrease of positive interaction between minority and nonminority students.

10. Removal of students from opportunities of understanding how to live in a multiracial society.

11. Loss of one-half of Title IA services for elementary school age children, in addition to 50% of the cost to the remaining Title I school; and possibly the loss of the entire Title IA program plus material/supplies * * * resulting in a complete loss of remedial programs in the District.

12. Title VII ESAA services to seven schools in the area of counseling, language development, reading, and human relation development.

13. Loss of minority staff recruitment.

14. Lack of staff ability to deal with minority schools.

15. High Hispanic population schools, which include a high migrant population, would become transient.

16. A reduction in the attainment of English by monolingual Spanish-speaking students who attend schools with high concentration of Spanish-speaking students.

IRREPARABLE HARM RESULTING FROM IMPLEMENTATION OF INITIATIVE 350

Implementation of Initiative 350 in Pasco *during the present school year* would cause the following irreparable harm:

1. The instructional program of hundreds of students will be disrupted in the middle of the year by reason of changing schools and changing teachers.

2. The goodwill, confidence and loyalty of hundreds of parents and students will be lost by reason of the District assigning them to schools other than the ones they are currently attending.

3. The District will become ineligible for receipt of thousands of dollars to conduct programs for minority and disadvantaged students.

4. Because of lack of funding, a number of state and federally funded programs designed to meet special needs of students will be terminated.

5. There would be unanticipated expenditures of thousands of dollars to carry out the necessary administrative and clerical activities required by reassignment of hundreds of youngsters to schools other than the ones that they are currently attending.

/s/_____
H. Jay Childers

SUBSCRIBED AND SWORN to before me this 26th day of December, 1978.

/s/_____
Notary public in and for the state of Washington, residing at Pasco.

EXHIBIT A (to Exhibit 97)

THE PASCO DESEGREGATION PLAN

A Synthesis of the Plan as Contained In ESAA Title VII, 1973-74 Proposed Project Narrative

PASCO SCHOOL DISTRICT No. 1 recognizes and subscribes to the premise that Washington State public school systems can and should take the following steps toward achieving comprehensive racial and socio-economic desegregation in the local system:

1. Pasco School District and the Board of School Directors have adopted written policies which recognize the benefits of racial and socio-economic desegregation in the school system. These policies are intended to provide direction to all school personnel in furthering the welfare of our nation, state and our community through equality of educational opportunity.

2. Pasco School District continues to recognize the need for staff training in professional skills and attitudes necessary to accomplish quality education in a pluralistic system. Efforts funded locally and regionally have taken place since 1970 in the school district whereby training needs are being met. The

school district has worked with Eastern Washington State College, Central Washington State College, the University of Washington and Washington State University in efforts to accomplish training goals. These efforts shall continue.

3. The Board of School Directors and the District Office administration have made a conscientious effort to make administrative assignments in such a manner as to promote racial and socio-economic desegregation, and to provide quality supervision of K-12 education in the local system.

4. The Pasco School District maintains a practice to assign student teachers, cadet teachers, visiting teachers, paraprofessionals and interns to school and classroom environments which are multiethnic, multiracial and socio-economically heterogeneous. This is to provide students and professionals with experiences working together in a desegregated and pluralistic school system.

5. Pasco School District maintains a practice to assign substitute and part-time teachers to school and classroom environments which are racially and socio-economically desegregated. This practice serves a two-fold purpose: Substitute teachers are provided opportunities to work with teachers of varied racial and socio-economic backgrounds.

6. Since 1964-65, Pasco School District has conducted studies of educational facilities and has implemented plans incident to these studies for the purpose of increasing racial and socio-economic desegregation. At this time, there has been achieved a racial and socio-economic balance of children among school buildings and among programs in these buildings.

7. The selection of new school sites in Pasco School District and the refusal to build a second high school have each contributed to long-range continuation of desegregation at all levels of the K-12 system. The newest elementary schools are the neighborhoods where low-income housing has been constructed. In 1965 the only "ghetto" school was closed.

8. Pasco School District has acquired and made maximum utilization of multiethnic, multicultural

and (bilingual instructional) materials for use throughout the K-12 system. Special teachers and librarians have been employed since 1970 to ensure full utilization of these materials.

9. Pasco School District has defined curricular, co-curricular, and extra-curricular student groups and organizations for the expressed purpose of providing increased opportunities for students of different backgrounds, and to interact in competitive and non-competitive ways.

10. Students service in Pasco School District are reflective of pupil populations. Counseling, guidance, testing, placement and so forth are services which are sufficiently flexible in design so as to provide for racial, socio-economic and other critical differences in meeting particular needs of students in the pluralistic Pasco system.

DESEGREGATION PROCEDURES

5112. **School Attendance Areas and Transfer of Elementary Students.**

The Board of Directors accepts its responsibility for establishing attendance zones in such a way as to facilitate the educational program. In considering school attendance areas, consideration will be given to the following factors:

A. Educational needs of students
B. Proximity of students to school plants
C. Safety of students
D. Ages of students served
E. Nature of educational programs housed
F. Racial/ethnic balance
G. Capacity and physical condition of school plants

5112.1 **Transfer of Elementary Students**

It is the belief of the Board of Directors that class size within the Pasco School District should be balanced in order to help ensure equal educational opportunity and economically sound and educationally desirable levels.

Shifts in the elementary pupil population may be made to rectify imbalances in student enrollment patterns. This will be

accomplished through intradistrict transfer of students and/or the alteration of attendance boundaries.

5112.2 **Procedures for Transfer**

In the event of imbalance within a given building, the possibility of combination classes will be given first consideration if there is sufficient classroom space available.

a. Other procedures which may be used include the following:

1. Each building shall have a designated enrollment which is consistent with the class size policy and with the building capacity for health and safety factors.
2. When foreseeable, all adjustments or transfers will be established prior to the first day of school with notification made to affected parents via personal contact, telephone, or conference. In the event balancing is necessary after the beginning of school, children and parents shall be notified in the following manner.
   (a) The number and grade level of pupils to be transferred shall be determined.
   (b) Children shall be selected on the following basis: (1) a neighborhood area; and (2) proximity to an established bus route; (3) number of transfers the student has previously made within the District.
   (c) Parents shall be notified by the building principal in advance of the transfer, by telephone or personal contact with a follow-up letter clearly stating the background information necessitating the transfer.
   (d) Transfers shall be effected at the earliest possible time.
   (e) Every effort will be made to ensure that students are not transferred away from special programs

designed to benefit them.

3. When appropriate, balances shall be achieved by means of minor adjustments of boundaries between two adjacent attendance areas.
4. Children of the same family shall be kept together if it is at all feasible.

EXHIBIT B (to Exhibit 97)

SECTION FROM BOARD'S POLICY

All policies of the Pasco School District were revised extensively by the Pasco School Board of Directors and were adopted at a regular school board meeting on April 22, 1975.

13.00 RACIAL RELATIONS

Desiring to record its position in regard to the urgent matter of racial relations, the Pasco School District holds:

1310. That a better educational experience for all children exists if every child has the privilege of learning in a multiracial setting.

1320. That the contributions made by all racial groups to our country's growth and development should be emphasized in the instructional program.

1330. The recruitment of qualified teachers, administrators, paraprofessionals, auxiliary teacher aides, bus drivers and custodians be broadened not only to build a multiracial atmosphere, but as a step in bringing racial minorities into socially desirable employment.

1340. That vocational technical courses be broadened to ensure that no barrier, real or implied, precludes equal employment opportunities for every student.

1350. That extra and additional funds should be used to provide compensatory education and services for any who come from culturally and economically deprived backgrounds.

SUMMARY OF DESEGREGATION PLAN

The plan can be summarized with the following statements:

1. The Pasco School District will continue to develop an effective plan to desegregate its schools if needs dictate certain changes are necessary and beneficial for the students enrolled.
2. The Pasco School District will continue to recognize the need for staff training in professional skills and attitudes necessary to accomplish quality education in a pluralistic society.
3. The Pasco School District will continue to recruit minority personnel to provide Equal Educational Opportunities for all its students.
4. The Pasco School District will provide curriculum to its students that are multiethnic/multicultural in contents.

EXHIBIT 99

EXCERPTS FROM PREFILED WITNESS STATEMENT OF DR. EUGENE TONE

* * *

15. In April 1968, the Tacoma School Board adopted major changes designed to ease the perceived racial imbalance in Tacoma schools. The major changes included:

(1) Closure of McCarver Junior High School as a junior high school, and transfer of all junior high school students attending McCarver to junior high schools throughout the district.

(2) Establishment of an exemplary elementary school ("magnet school") at the McCarver Junior High School facility, with admission open to students throughout the district by voluntary application only, and with student attendance controlled by the district to preserve an appropriate racial balance;

(3) Closure of Central Elementary School;

(4) Transfer of all sixth graders at Stanley Ele-

mentary School to other elementary schools throughout the district;

(5) Reaffirmation of the district's position that no high school in the Tacoma School District will be allowed to become *de facto* segregated.

Exhibit T-6 is a true copy of the district policy implementing these changes.

16. Following this school district action, McCarver Elementary School went from an 87 percent black population in 1967 to a 53 percent black population in 1969. Exhibit T-7 is a true copy of the ethnic composition survey dated October 2, 1969.

17. In May 1970, the Tacoma School Board adopted policies specifically committing the district to elimination of racial imbalance to levels within the State Board of Education guidelines, and establishing a technologically advanced elementary school ("magnet school") at Stanley Elementary, with an admission program similar to that existing at McCarver Elementary. Exhibit T-8 is a true copy of the School Board policy adopting this program.

18. By September 1971, elimination of board-defined racial imbalance at McCarver Elementary School had been completed, according to the ethnic composition survey dated October 2, 1971. Exhibit T-9 is a true copy of the October 2, 1971 ethnic composition survey.

19. By September 1972, no school in the Tacoma School District had minority enrollment in excess of 50% of total student enrollment except Hawthorne School. Exhibit T-10 is a true copy of the ethnic composition survey dated October 2, 1972.

20. Hawthorne School had, since 1968, housed much of the District's Headstart and Follow-Through programs, which added sufficient numbers of students to justify an otherwise inefficiently low general enrollment at the school. Those programs continued into the 1973-74 school year, when they were all finally moved to other District facilities. The Hawthorne building was, even in 1972, a substandard structure, and Health Department and Fire Department authorities had raised serious questions about

the desirability of Hawthorne continuing to serve children, and particularly young children, because of earthquake damage and structural and other defects sustained by the Hawthorne building. After the District removed its programs from Hawthorne, it leased the facility to the Puyallup Indian Tribe.

21. In November 1972, the Board adopted a limited voluntary optional enrollment program for high school students, allowing high school students to attend, with certain qualifications, the school of their choice. * * *

EXHIBIT "T-8" (to Exhibit 99)

RELIEF OF DE FACTO SEGREGATION AT STANLEY SCHOOL

Believing that the American society grows healthier when all of its members are able to function freely in the mainstream of our life, and believing that the educational experiences of children increase their ability to function productively in the American society, and believing that all children should have multi-racial educational experiences, the Board of Directors of Tacoma School District No. 10 adopts as policy the following:

1. When any school, elementary, junior high school or senior high school, reaches an enrollment in which students of any single minority group comprise 40 percent, specific actions will be taken by the Tacoma School District to prevent that school from becoming "de facto" segregated as defined by the State Board of Education.
2. In those schools that are presently "de facto" segregated as defined by the State Board of Education, specific actions will be taken by the Tacoma School District for the school year 1970-71 to reduce the degree of "de facto" segregation in those schools.

Taking into account the policy statements of the State Board of Education, its own statement of policy and the results of the survey of parents in the Stanley attendance

area, the Board of Directors of Tacoma School District No. 10 now adopts the following recommended actions:

1. The optimum enrollment for students attending Stanley Elementary School is established at 600.
2. The desired objective for Stanley Elementary school is a student enrollment that is no more than 40 percent of one minority.
3. In order to achieve, in part, the objective regarding the racial composition of Stanley School, all families moving into the Stanley attendance area after June 1, 1970, will be offered a choice of schools other than Stanley for their children to attend.
4. In view of the stated willingness of some parents to have their children attend other schools, the Tacoma School District will initiate an intensive effort to assist students presently in the Stanley attendance area to attend schools elsewhere in the Tacoma School District. Special efforts will be made in this process to provide convenient and free transportation.
5. Since funds have now been assured through non-local sources, the Tacoma School District will implement as rapidly as possible the Technologically Advanced Elementary School program at Stanley, an exemplary program similar to that at McCarver, in order to attract Caucasian students into Stanley School.
6. In response to the survey of parent attitudes in the Stanley Elementary School attendance area, the sixth grade level will be restored at Stanley Elementary School, so that it might provide a complete elementary school educational program from kindergarten to the sixth grade level.
7. The Tacoma School District will proceed with its present planning to improve the physical facilities at Stanley Elementary School, utilizing funds tentatively allocated to the District under provisions of Senate Bill 737.
8. A portion of the funds available to the Tacoma School District for a summer counseling program will be utilized in the month of June to assist with the implementation of these plans. Elementary schools to receive Stanley students will be

requested to make preparations for their introduction into these schools, including advance invitations to be presented to parents through the summer counseling program.

EXHIBIT 117

TO THE STATE BOARD OF EDUCATION
October 19-20, 1978

JOINT POLICY STATEMENT WASHINGTON STATE BOARD OF EDUCATION WASHINGTON STATE HUMAN RIGHTS COMMISSION

The Washington State Board of Education and the Washington State Human Rights Commission recognize the increasing complexity of assuring equal opportunity and excellence in education to all children and youth in our public schools. Both boards adopt the following criteria as guidelines for developing programs in this urgent area of human relations.

The Washington State Board of Education and the Washington State Human Rights Commission jointly declare that racially segregated schools are a barrier to quality education and to equality of opportunity in education. Therefore, these boards agree that:

a. The term "racial segregation" be and hereby is understood to mean racial isolation that generates feelings of rejection or superiority, and that such isolation may be either numerical, psychological, or both, the two boards recognizing that special attention should be given to American Indian communities because of the trust relationship with the federal government.
b. The goal of these two boards is to afford every child in the state a multi-racial/multi-cultural educational experience free from discrimination in any form.
c. Racial segregation as defined in (a) above must be

eliminated from the public schools of the State of Washington.

d. Wherever a condition of numerical isolation exists, a district should be required to submit a plan and annual reports to the State Board of Education, such plan to include a timetable for accomplishing this objective.

The State Superintendent of Public Instruction will continue to require each school district to keep annually revised statistical information as to the racial composition of school enrollment and staff in each school. A copy of this information will be sent to the State Human Rights Commission each year as soon as it is compiled.

For purposes of this statistical information, the following criteria are to be used in determining the existence of racial isolation within a school district. Racial isolation is a condition existing when the racial composition of students in any school building fails to reflect the racial composition of students for the entire district. Care should be taken to ensure, even in districts with low percentages of minority students, that no schools are racially identifiable. The State Board of Education considers racial isolation to exist in a school district when:

> the combined student enrollment in a school/program exceeds the districtwide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of a school/program will not exceed 50 percent of the school enrollment. These standards apply except in special circumstances where more restrictive criteria may be determined necessary by the two agencies.

We recognize that it is no easy matter for school board members, concerned citizens and educators to bring about the desegregation of students. Desegregation is only the first step toward integration but is the step, nonetheless, that must be taken if progress toward integration is ever to be achieved. School desegregation implemented with integrity and with adequate human and financial resources

enhances the educational opportunities for all youth.

Those involved in the preparation of school personnel in undergraduate, graduate and in-service programs share the responsibility for equipping educators with the necessary knowledges, skills and competencies which will help change desegregated buildings into integrated learning environments. We urge the development and implementation of processes such as:

a. Examining and analyzing school district policies and procedures
b. Increasing administrators' expertise in working in the desegregated setting
c. Augmenting teachers' skills in applying appropriate instructional techniques in the desegregated setting
d. Strengthening school-community communication

The Washington State Board of Education and the Washington State Human Rights Commission will continue to employ mechanisms preventing the extension of racial isolation where this is or threatens to be a problem. At the same time, educators must ally themselves with other groups in the state and local community which are working to eliminate the practices which result in segregated housing patterns such as zoning policies, housing subsidy policies and mass transportation patterns.

We recognize that some school districts have progressed through comprehensive desegregation and reached the point where they have implemented an encompassing set of goals for integration. To continue this achievement, the following educational goals are reaffirmed.

.... The academic achievement of minority students should be improved so that distribution of their academic achievement scores will correlate with that of the majority students in their classrooms without an accompanying negative effect on the achievement of the majority. The average performance of students from all ethnic groups will approach the state and national norms upon testing.

.... Minority students should become integrated into the social system of the school so that they hold comparable status in that system to those held by majority students, such as in athletics and all other curricular and extracurricular activities.

.... There should be integration of minority educators throughout the staff of the schools of the district so that the opportunity structure of the district is open equally to minority and majority educators. Minorities shall be recruited for positions in the schools at all levels.

.... Districts should provide a climate for meaningful interaction and input between majority and minority parents.

.... Attitudes toward self and motivation for school and academic achievement should become equal and positive in all groups.

.... Curriculum materials, teacher attitudes, and teaching procedures should be developed so that each child has an opportunity to understand and to develop pride in one's own ethnic heritage and to understand and respect the ethnic heritage of other groups in the classroom and in American society.

A majority of the school systems in Washington State have multi-racial enrollments but are not truly integrated. To prepare young people in these systems for living in a multi-racial and multi-cultural society requires extraordinary measures and imagination. Such systems should strive to achieve an integrated staff and administration, develop educational programs designed to bring young people of different races and cultures together, design work study projects in a broader neighborhood than the local community and insure that the curriculum and enriching experiences of the school program reflect the diversity of the world of which their students will soon be a part.

The Washington State Board of Education and the Washington State Human Rights Commission reaffirm their position that a component of quality education is racial integration. The presence in a school of children from different racial and socio-economic backgrounds is an im-

portant element in the preparation of young people for active participation in a pluralistic democracy.

The public school has long been viewed as a basic social instrument in attaining our traditional goals of equal opportunity. While we recognize that the school alone cannot solve the ills of segregation that exist in the larger society, it is still incumbent upon the public school systems to develop and administer policies, procedures, and programs in ways which lessen the deleterious effect of racial prejudice and segregation on both majority and minority children in the total community.

School boards have the responsibility, as well as the duty under the Federal Constitution and laws of the State of Washington, to assign children to buildings in ways which result in the maximum desegregation possible by whatever means that are necessary.

Whereas, Initiative 350 would if passed apply to school districts throughout the State, and would decrease local community control over important parts of the educational program, and

Whereas, it is sponsored by a group having the sole purpose of overturning the Seattle Plan for desegregating that District's schools, and

Whereas, The Seattle Plan has previously been commended by the State Board of Education as a sound, locally devised plan which was developed with broad participation of groups and individuals in the community, and

Whereas, the sponsors of Initiative 350 are seeking to accomplish, through a state-wide initiative directed at a local situation, what they have been unsuccessful in accomplishing through the courts,

Now be it resolved that:
The State Board of Education strongly believes

that the passage of Initiative 350 would be * * * for education. It is the Board's judgment that the initiative would deprive communities throughout the State of a significant measure of control over their local school programs.

EXHIBIT A-18

EXCERPTS FROM PREFILED WITNESS STATEMENT OF DR. DAVID L. MOBERLY
(Tr., pp. 147, 148)

* * *

Q. What about any specific input that you might have had about Blacks moving out of the Seattle school districts as a direct result of desegregation efforts? Have your administrators been channeling any information like that?

A. I don't know. In comments, we have large numbers of minorities that are opposed to desegregation. The Asian community, as I go out, I had concerns voiced about desegregation. I think, publicly, we have seen, recently, minorities at our Board meetings opposing desegregation at both the Madrona and the Coleman attendance areas. I think it is a false assumption on all of our parts to assume that only the majorities are opposed to desegregation. I think the population is mixed out there in viewpoints on it.

Q. When you say that they are opposed to desegregation, is that to desegregation as a whole or is this to the desegregation efforts, the mandatory aspects of desegregation?

A. I think the mandatory efforts, in other words, "busing." I haven't found anybody that really loves it.

Q. They go along with the idea of desegregation, but not forcing them onto a bus?

A. Not by busing.

If you get out in your Asian community, your Black community, you will find a lot of opposition to it.

It's not a popular thing.

Q. Have they ever articulated any reasons why the mandatory busing is particularly distasteful to them?

A. I get every reason under the sun as I talk with people, and I do talk with a lot of people, a lot of people call me just to complain. This morning I got a call, and the parent was very upset and was not against desegregation, per se, but was upset about the time and the fact that she had to get up at 6:30 in the morning to get that kid off to school. Now, it would be all right if we would slide the starting time one hour the other way so that we could sleep for another hour.

So, you know, you get all kinds of reactions on it. I think, basically, the attitude, when it involves busing with the average public out there, they claim — they favor the neighborhood school for as many different reasons as the people you talk to. * * *

APPELLEE'S DESIGNATIONS
EXCERPTS FROM TESTIMONY OF CHERYL BLEAKNEY
(Tr., pp. 43, 63-67, 69)

* * *

and it was exactly seven years ago the month of April, we received a decision by the State Supreme Court, declaring that the Citizens Against Mandatory Busing case against us was invalid, and that we could go ahead with the middle school desegregation program, which the previous Board had set in motion, and had been stayed by the Court.

That began the following September. My best recollection of the events is that it's been a continuing commitment to try to achieve integration of our school system, because of the belief in the educational benefits of an integrated school system.

We have had a number of other problems, financial in particular, that have taken a great deal of our time; but I would have to say that desegregation has been

one of the major interests and concerns of the Seattle School Board. * * *

* * * The cost of the transportation in a voluntary plan is by its nature more expensive, and I believe we have figures that could certainly show this: That when you move lots of children as a neighborhood together, you fill up a bus to its capacity of 25, 30 children, and it becomes a most economical way of transportation. There are maybe two or three stops within a neighborhood, and then directly to the destination.

With a voluntary plan, you accept children over a widely scattered area. The buses frequently are only half utilized, and they spend considerably longer times picking up those children in order to not make it too long a bus ride for the children.

My guess — from talking with our budget people, it would probably cost twice as much. I would have to look at more specific figures than that.

On the cost of the voluntary plan from the recruitment point of view and from the designing of the program, I think national experience has been that magnets are expensive, not just startup costs, but so often what does attract people to magnet programs is the fact that they are richer in resources, ours certainly have been; richer in the numbers of staff assigned to them.

The other aspect would be the very recruitment of students, which is a time consuming and expensive process, and it must go on every single year.

Q. Was the Seattle School District threatened with legal action if it did not desegregate its schools?

A. Yes, we were. The N.A.A.C.P. had filed a formal complaint with H.E.W., which we were apprised of. The American Civil Liberties Union had informed us that they were intending to take us into court if we did not act on — I believe by a certain date, which, as I recall, it was in the spring.

Q. Of what year?

A. Of '77, and I believe that at the time of their annual meeting, they would take action upon that date if we did not do something to demonstrate our good faith efforts of desegregation.

Q. In a sense, it is obvious that the Seattle School Board went ahead in adopting the Seattle plan. Can you tell us why you did not stand back and wait for litigation? In other words, standing back and wait to become a defendant, and if you can, what similar explanations you heard from other Board members as to their position on that issue?

A. I think a motivating factor for me certainly was to avoid the entanglement of the courts in our school system. All of us have observed the schools throughout the United States who have been under a court order to desegregate, and have talked to school board members from those school districts at national conventions or meetings.

It was my desire, and I believe that of the other Board members, to the extent possible, to retain control over our own school district, to retain some flexibility on what decisions would be made. I think we had the examples of Cleveland, that had to have its budget okayed by a federal judge before any decision could be made.

We felt that we wanted to design a system that defined racial imbalance, recognizing our multi-ethnic population that all of us cherished, the diversity that we do have in our community, and felt that perhaps leaving it to a court to decide would not recognize what we had in Seattle.

We were certainly encouraged by community groups to avoid the lengthy litigation; and I believe the trauma, even, that would come to a community in trying to rehash old problems, to open old wounds, insofar as what acts the School District might or might not commence that aided the desegregation of our schools.

All of these factors work together, I think I would

have to add, too, and I believe I am speaking for all of the Board members when I say we all have accepted desegregation-integration as a primary role of our School District.

It was adopted conclusively by our School District in setting our long-range goals, so that we were acting consistent with what we believe was in the best interests of our children, and the children of Seattle.

Q. You took an oath of office, did you not, when you became a school board member?

MR. MURPHY: Your Honor, when this comes up, can we stipulate to the good faith of the members of the Seattle School Board?

MR. HALL: They have denied in their findings that these School Board members took an oath of office.

THE COURT: I am going to overrule the objection.

Q. (By Mr. Hall) You took an oath of office when you became a School Board member?

A. Yes, sir.

Q. To, among other things, defend the Constitution of the United States and of the State of Washington?

A. Yes, I did.

Q. To what extent was that a material factor in regard to the decision to adopt the Seattle Plan?

A. For me, it was a factor, because after my readings of court cases involving other school districts, particularly in the northern United States, I felt we had a constitutional obligation to desegregate, and I felt an obligation to follow that dictate.

Q. You are familiar with Initiative 350?

* * *

the placement of students, or where students will go to school.

Is that correct? Is that the limitation? If 350 is implemented, as she understands the command of 350?

MR. HALL: I might just say, Your Honor, that counsel on the defendants' side have repeatedly called

upon the School Board to implement 350 without the trauma of this lawsuit.

It is curious to find this last objection to say it requires a legal conclusion when, among other things, the District had asked for a legal conclusion, and has not received it.

THE COURT: Why don't you reframe your question, will you, please?

Q. (By Mr. Hall) What, Mrs. Bleakney, in your experience as a School Board member, would be the effect of Initiative 350 on the schools and students of the District, if the initiative is implemented as you understand its language?

A. As I understand it, the effect would be to dismantle the Seattle Plan, to resegregate the Seattle schools, and to make it extremely difficult if not all but impossible, to desegregate its schools in an educationally sound way.

EXCERPTS FROM TESTIMONY
OF DR. GARY ORFIELD
(Tr., pp. 113-117, 121-122, 124-131)

* * *

A. No. My idea about the work that I could do in the Seattle case was to review the available data to the best of my ability to see whether there was anything about the pattern of ghettoization in Seattle that differentiated it from other cities, where I had done intensive work, or from the national literature on this issue, with which I am very familiar.

So, my object was to find out whether there were distinguishing features about Seattle which would make the information I have from other sources not be applicable here, and I did not find that.

Q. You didn't do any studies of any other Washington cities, or Washington school districts, did you?

A. No.

Q. Were you aware this was a state-wide enactment that is being challenged in this litigation?

A. Yes.

Q. But no one has asked you to do any other studies in connection with any other cities; is that correct?
A. No, I am not here to testify about Washington conditions.
Q. You haven't traveled around the City of Seattle and observed things here personally, have you?
A. No. I have not done a field study in Seattle.
Q. In fact, you just arrived here today, didn't you?
A. Yesterday.
Q. In your statement you referred to the process of ghettoization. Could you give us your definition of ghettoization?
A. Well, traditionally in American cities, northern and western cities where there was not a large black population present — at the time you began to have a significant black population arise in a city, particularly, you have a process of housing segregation begin to take hold, people are concentrated, small clusters of black settlements grow together into a larger ghetto community.

The principal flow of migration into a metropolitan area is into that expanding ghetto, and typically these ghettos expand directly on periphery or in new areas that are a little — outlying their periphery, that again then go together into a continuous area of segregated housing.
Q. And that's your definition of ghettoization, is that correct?
A. Well, that would be a description of what happens. It doesn't explain the whole theory, or observations about why it happens.
Q. Does the process of ghettoization — strike that

The process of ghettoization does not necessarily imply that the area that becomes ghettoized becomes totally saturated with minorities, does it?
A. Typically it moves towards higher and higher segregation levels in the core of the ghetto, and continual expansion on the periphery.
Q. In a given area in a city, 50 percent minority, would

you call that residentially segregated?

A. If an area was 50 percent minority, the probability is very high it is closely adjacent to an almost minority area, and I would say that that was almost inevitably going to be a transitional area.

Q. As to the area you are talking about, would you say an area that is 50 percent minority is residentially segregated?

A. I would say it is in the process of becoming residentially segregated, in all likelihood. There are some exceptions to that, of course.

Q. If an area was 60 percent minority saturated, would you say that is residentially segregated?

A. I would say that in our experience in American cities, such an area, if it was 60 percent black, it would almost invariably become all black, given the operation of the segregated housing market.

Q. So, as I understand your definition, residentially segregated areas include areas that aren't saturated with minorities, not totally saturated, is that correct?

A. I think you have to look at several different kinds of communities. You have those completely segregated where there is almost no white or anglo residents. You have those which are transitional, which are in the process of becoming all completely segregated. You have those which are all white, virtually all white, and you have integrated communities, some stabilized with integrated population, but we have very few of those in the United States that are substantially integrated and stable.

* * *

A. Neighborhood schools, as they are applied to a dual housing market, are not a neutral racial concept.

Q. As I read your statement — however, don't you go on to say that the question is whether or not neighborhood schools — the policy factors that weigh in favor of neighborhood schools should be measured against and overcome those which weigh in favor of achieving racial integration at all costs? Isn't that your

statement there?

A. I don't think I would say it that way.

Q. Perhaps we should just quote it. You say, "The real issue which must be faced is:" — look at page 9 — which should have priority are "neighborhood schools of greater importance even if they guarantee perpetuation of public school segregation."

THE COURT: Your question was, are there not certain advantages to neighborhood schools? Has that been answered?

MR. CARR: I'm satisfied that the witness contradistinguished between neighborhood schools and public school desegregation, and I just wanted to ascertain if that is indeed the statement you made at page 9, or are you suggesting —

A. (By the witness) No, no. I made the statement as it appeared here and the way I would explain my answer to that question — if you want to know — is that the substantial majority of American children do not attend neighborhood schools. Those that do not attend them for a non racial reason are very satisfied with the schools that they do attend and the way they get to them.

Q. You are saying that the substantial majority of American students do not attend neighborhood schools?

A. Fifty-two percent of the children in the country, according to the last statistics that I have seen, are bussed to school.

Q. Does that necessarily mean they don't go to the closest school or next closest school?

A. No, but it is not a walk-in neighborhood school in the sense which is easily accessible, which is usually the reason for giving advantage to the neighborhood schools.

* * *

Q. That was the Office of Policy Planning?

A. Yes, I did look at many things from the Office of Policy Planning.

Q. Did you look at any data containing the residential

segregation information for the year subsequent to 1964?

A. Yes, I was going to answer that, but I didn't have a chance. I have another map here that includes the racial distribution from the 1970 Census, and I did review a publication. This is Mr. Crosetti's affidavit, as a matter of fact, called Population Trends by Race in the Seattle Area from 1900 to 1976, which includes a statement that the black population in the 1970 Census remained heavily concentrated with the Garfield, Madrona area as of 1970, despite rather large increases in certain other communities, and does include information that brings in the latest available Census data.

Q. You mentioned Dr. Tauber's book. What was the reference there?

A. Dr. Tauber's book called Negroes in Cities, it is the classic work on the development of ghettos and their conditions in the 1960s, suggesting that some of the national indexes that have been used for calculating residential segregation may have understated the segregation in Seattle, because they used the wrong unit of analysis. The Census track, as the use of analysis, where you have a relatively small minority population, like Seattle, and to use a relatively large unit like a Census track, you get a statistic that suggests the city is more integrated than it actually is. So, they found when they went to block level segregation data, Seattle's segregation level shot upwards. I am familiar with this kind of situation, because I grew up in Minneapolis, which is very much like Seattle, has a relatively healthy segregated ghetto but which is very thin, especially on the outside. If you take a Census track it doesn't look very segregated at all. If you go down to the block level, it looks quite segregated.

My impression is that is what you have to do in Seattle to get an accurate perception of the degree of residential segregation.

Q. Have you examined segregation reports put out by the Seattle School District?

A. Yes.

Q. What is the relationship between school segregation and residential segregation, and then in followup to that, could you comment on the relationship between school desegregation and residential segregation?

A. I think that school segregation and residential segregation have an interacting dynamic that works in the ghettoization process, and that when you have typically — typically, it is the younger minority family with school children that are most eager to get housing outside the core of the ghetto community. They move into a neighborhood which is typically occupied by older white families that don't have very many young school age children. One of the first things that happens is the school right on the boundary of the ghetto area becomes fairly heavy minority enrollment, even though there aren't many minority families in that neighborhood yet.

I think the natural spread of ghettos in that process, the change of schools, happens before the change of the neighborhood and I think becomes a leading force in changing the neighborhood, because a school becomes predominantly minority long before that neighborhood does, and the white families quit looking at that as a neighborhood they will move in.

We did an analysis of a hundred schools in Los Angeles last summer and we found there were only three or four in the entire city that had remained racially stable. All of them had moved steadily towards more and more minority concentration. So, I think the two things act together, and that the basic problem in resegregation of a neighborhood is not so much that the whites move from the neighborhood, it is that the white families no longer consider moving into that neighborhood, and given the fact in the United States a family moves every six years, it means you have to replace the population of a neighborhood in six years. Whites quit moving into a neighborhood, and it rapidly becomes very, very heavy minority within just a few

years.

Q. Go ahead.

A. The second part of your question is this relationship between different kinds of the segregation plans and residential desegregation or integration, and I think that there is a relationship and we see that — I believe, at least, that the more limited the desegregation plan, the closer it is confined to the ghetto, the more it feeds the ghettoization process because it creates a situation where there will be one layer of schools outside the ghetto where we will have substantial minority population and everything else will be set aside as an all white area.

It means a young white family that is considering residential location has to decide between moving into an area with substantial minority enrollment and an expectation that it will become all minority if it follows a process of the nearby ghetto community, and an area that is all white, and I think that you can only achieve residential — stable residential integration when you can offer them a third choice, which is a school which will probably remain integrated. So, I think that the larger, the more comprehensive a plan is, the greater the chance of presenting rapid ghettoization; and the more limited the plan is, the more it feeds the ghettoization.

Q. Are you aware of any specific examples in the United States where the implementation of desegregation has had the effect of slowing down the ghettoization process?

A. Well, the research in this area is pretty preliminary at this stage, and I wouldn't want to overstate it, but it is true that some of the cities that implemented a citywide desegregation first, like Berkeley and Riverside, California, and Sacramento — especially Berkeley and Sacramento were among the most residentially integrated communities in the country in the 1970 Census.

I am now engaged in a research project in 16 cities

around the country, and the preliminary information we are finding — in the places where broad scale desegregation plans — especially metropolitan ones —

THE COURT: When you say "desegregation," I assume you mean school desegregation?

THE WITNESS: School desegregation.

THE COURT: Would you start again.

A. (By the witness) In the cities that have — in this particular project, we are looking at metropolitan-wide plans, but we are finding that the broader the plan the greater the tendency there is for the school, as a central way of steering people residentially, to recede.

Realtors in a number of cities that we are visiting that have had major plans, including entire metropolitan areas for a number of years, report that the school is almost never mentioned in real estate marketing.

What we are finding in the preliminary return so far is that in areas where there is no plan you find heavy advertising of schools on either side of the line where you have substantial minority schools, and where you have an all white school, the all white schools are advertised in minority areas; the Catholic schools are not. So, I think the research is going to develop in a way that is going to show a powerful relationship between the type of plan and nature of ghettoization process. I wouldn't want to state, you know, that for sure as a fact yet. There is evidence accumulating. It is still in the early stages of investigation.

Q. What is the effect of a voluntary only school desegregation plan on the ghettoization process?

A. Well, typically these plans will bring — in a big city will bring transfer of so many minority students into schools in white areas, almost no transfer of white children into the minority community school systems. So, you have some emptying out of those central city schools. You don't have much effect on whites. One of the problems of these plans, magnet school plans, is

sometimes they destabilize integrated neighborhoods, because many of the white students who go into a magnet school go out of an integrated neighborhood. We found this very true in our investigation of Los Angeles.

Many of the whites left neighborhoods which were integrated, and thereby made those neighborhoods more segregated with that transfer.

I believe there is some evidence of the same phenomenon in other cities. I have heard the same thing is true in Milwaukee. There are a great many white transferring to magnet schools out of integrated areas that might tend to feed the ghettoization process.

Q. All right. One final housekeeping item. Could you just briefly summarize the testimony you have offered in your statement today?

A. Well, I think that I would say that there is no probability of achieving substantial desegregation which is lasting and comprehensive for minority children in a big city without mandatory reassignment of students; that there is — that the segregated housing market for blacks is still very powerful in this country.

We don't have any substantial evidence that it is changing in any fundamental way, and that we should design school desegregation plans that have a broad reach, and that also try to support the development of larger and larger areas of stable residential integration.

EXCERPTS FROM TESTIMONY OF CHERYL BLEAKNEY

(Tr., pp. 163, 173, 176-178, 181-183, 188-191)

* * *

Q. At page 22, line 16, you make the statement that because whole neighborhoods moved together, the race of the individual child is not significant in determining who will move?

A. Yes.

Q. Is not the race of an individual child considered in

deciding whether or not he can move into, say, one of the option programs under the Seattle Plan?

A. Yes, that's true. That would be in any voluntary program, I assume.

Q. Any voluntary option, the decision of whether to allow that child to get into that program is based on his race?

A. That is generally the object of a voluntary program, is to entice children of the proper race to go in the proper direction, proper race being the one that would aid integration.

* * *

THE WITNESS: Are you asking for an opinion by me of whether I think having options — yes, I believe it has. I believe by allowing some choice within the program, we have encouraged parents to take advantage of some special programs.

We have found the greatest movement has been among those schools, or between those schools which are paired and triaded, where its children would have been forced to move anyway, and I think some 39% of our volunteers have come from those particular schools.

* * *

A. I personally feel that segregated education is unequal and poor education. I believe that both for minority children and for white children.

As I say, I recognize that our plan does not address majority isolation. I think we need to.

Q. What are the consequences of segregated education insofar as you have learned in studying this issue?

THE COURT: Maybe you have asked the question I was going to ask, but you said that you felt it was unequal and poor education. What I would like to know is why you feel that way?

THE WITNESS: Okay. I think our children need to grow up in a world that is pluralistic. Probably the best training for growing up in that world is to mix in easy relationships with children of many races and many backgrounds.

I believe that there are some definite advantages for minority children, principally because they tend to go on to institutions which are controlled by the majority, which this country is composed of, white people. If they tend to go to college it will be to predominantly white colleges, to work in white institutions, and I think for them the best preparation and the best success in those institutions will come if they have had relationships with white students.

I think there is a relationship which can be shown between poverty and minority races, a historical one which nobody wants to belabor right now.

I believe that where minority students are isolated and are frequently poor, they tend to receive the least attention in majority institutions; they tend not to be the squeaky wheels that get the oil, and for that reason I think there are advantages in desegregation.

There have been national studies that would seem to indicate that minority children do achieve better when placed in an integrated setting, and that majority children's achievement levels do not decline. It is for these multiple reasons that I believe in integrated education.

* * *

MR. HALL: Section three of Initiative 350. I was reading directly from Section three of Initiative 350, and the examination — prior testimony was drawn from a letter, statement of Mr. Johns, Exhibit 24.

MR. MURPHY: Before she answers, I would like to know if she is familiar with neighborhood school policies of every school district in the State of Washington.

MR. HALL: I asked if she was familiar with any.

THE COURT: The question was confined to her knowledge. This was the section —

MR. HALL: Three.

THE COURT: Three of the Initiative.

A. (By the witness) I am not familiar with any neighborhood school policies of school districts. I had felt that the lawsuit decided by the State Supreme Court, Citizens Against Mandatory bussing, Against Seattle School District, had pretty well established it was up to local school districts where they assigned students, until Initiative 350 was drafted and I had seen the first copy of it. I know of no other such written prohibition. That doesn't mean they don't exist. I just didn't know of them.

THE COURT: I guess your question was: Are you familiar with any other school districts that have taken advantage or used any one of these devices for the purpose of integration?

MR. HALL: I think my question was: Was she familiar with any instance where, in the context of a requirement that students be assigned to their neighborhood school, but the School District was prohibited from using these six or seven tools that that prohibition related in any way to anything other than race, efforts on the part of the prohibition to limit the ability of that district to desegregate its schools?

THE COURT: I tell you, that question is really difficult to me.

THE WITNESS: I am having trouble with it.

THE COURT: I am not saying it is too difficult for you, but it is too difficult for me.

Q. (By Mr. Hall) To what extent is it possible to desegregate the Seattle Schools if you are prohibited from using those seven tools listed in Section three of Initiative 350, and on the other hand, required to assign students to their nearest or next nearest school?

A. I consider it an impossible task, particularly within any context of the educational quality.

Q. In following the Initiative 350 campaign and arguments made by both proponents and opponents of the initiative, to what extent were these seven schools discussed in the context other than desegregation?

THE COURT: That is where she was present?

MR. HALL: Where she was present, that she knows of personally.

A. (By the witness) In any kind of spoken debates, I would call reference to the fact that these prohibitions would not hurt 99 percent of the School Districts in the State of Washington, would not even affect 99 percent of the School Districts in the State of Washington, which I took to mean it was aimed at the three percent of the one percent, which we were one of three.

* * *

Q. You testified in response to a question from counsel that you — and to your knowledge all of the School Board members preferred voluntary methods of desegregating schools, or a voluntary plan, and yet the School Board did not adopt the voluntary plan. Why?

A. Well, the total voluntary plan, I believe, had been written off at the time we adopted our resolutions. There was a general recognition that if we had a voluntary plan it would at least have to have a mandatory backup to it, similar to that that existed in the middle school program. When it came to a discussion of what were essentially the two types of plans the Seattle School District could adopt, it was essentially between a fixed assignment plan, where the children were assigned to a specific school and it could have voluntary elements within it or it could be a voluntary first plan with some sort of mandatory back-up to the voluntary first plan.

Do you want me to go on into the reasoning —

Q. If that explains your reason why, that is fine. If you haven't finished, I wish you would explain it.

A. The reason why we opted for the fixed assignment rather than the voluntary first one, is, I think, most of us would have preferred to give the community a chance, let it try it, see if we couldn't get enough students. I think we all knew that we were not going to be able to get enough students to do it totally voluntarily. We knew we would have to then reassign some students. They would have to be assigned proba-

bly as individuals, and designated on the basis of their race to fill buildings that lacked enough of a particular race to be designated. It meant upheaval every year. We had had the experience of the middle schools which was a relatively small and narrow area and affected only three or four grades. We had the experience there of seeing what had to be done, where each year you go through a recruiting phase and if you don't get the number of students you have to go out and randomly pick children and find them to go to that other school. I think a number of us had been struck with the humaneness of the pairing or triading program, because it did move neighborhoods of children together. It let parents know ahead of time what schools children were going to have.

They had, in essence, at the elementary level two elementary levels, one for early elementary and another for later elementary, and that there would be logical feeder patterns the children would follow through in, so there would be continuity in a child's life; that a parent who moved into an area had some sense of his or her child would go to school, could participate in that school, and help develop the program there with the logical expectation that the child would follow through in a certain pattern. There was no way we could use that type of a plan as a backup to a voluntary first plan, because you can't control where volunteers are going to go and it would be impossible to go through a recruitment phase to get enough volunteers, and then every year have to go through a process of trying to design a pair or a triad that would somehow meet any kind of racial goals afterwards.

It was with that realization that I believe the majority of the Board came to the conclusion that in balancing the aspects of both types of plans and what would be best in the long run for the city, by doing a pairs and triad, we would be producing a plan that had more of the elements that existed in our criteria, and that would more nearly satisfy the things we were

hearing the community ask for.

EXCERPTS FROM TESTIMONY
OF DR. MICHAEL STOLEE
(Tr., pp. 263-266)

* * *

I made no attempt to compare the middle schools or junior high schools or senior high schools. I did elementary only, and where I was not sure of the data, I omitted the schools. That is why I say this is a conservative statement.

For example, the 1977 data do not include any data for the Madrona School, and so I did not include that school in my computation. Perhaps, if I had had data, it may have been an additional school, and effect some other schools.

Ms. GREEN: For the record, what Dr. Stolee has referred to as Exhibit R is actually Exhibit 90, Plaintiff's Exhibit 90.

THE COURT: Exhibit 90 in this case?

THE COURT: In this case, yes, Your Honor.

Q. Dr. Stolee, in your opinion as an expert, is there any educationally sound reasons for having a student attend a neighborhood school?

A. I can think of none. The neighborhood is a concept that we really didn't hear too much about until desegregation started. It is interesting that the school systems for many years have assigned children to school outside of their immediate neighborhood for many special reasons. If it is educationally handicapped or special programs or gifted or talented or special occupational or preparatory programs, they assign them outside the neighborhood.

The neighborhood, I have found, is really no longer too important in our mobile society; that people do not seem to do their shopping, working, worshipping and recreation in the neighborhoods as they did before we were that mobile, and the result is that there really

is no reason on the face of it for an educational justification for attending the school closest to home.

Q. Are there other experts in the field of education who would agree with your opinion?

A. Yes.

Q. Can you name some of those, please?

A. I have discussed this matter with Gordon Foster, with John Finger, with a number of the people on the staffs of various segregation consulting centers who have — I don't know if they have all have been declared experts by courts, but I refer to —

MR. CARR: Well, Your Honor, I guess I am a little slow at the switch. I am going to have to interpose an objection, it seems to me, and ask that the question and answer given be stricken. It seems to me — one thing, he is an expert. He is an expert here who is telling us what his opinion is, and secondly, it is quite obvious from the way he has responded to the question, it was hearsay. So, on that basis, I would ask the witness be restricted to giving his opinions, what his opinions are, and not those of others.

THE COURT: I am going to sustain the objection. I know an expert can consult with others and refer to periodicals and books and so forth. I really would like to hear his opinion here in court today.

Q. (By Ms. Green) Dr. Stolee, what do the words "forced bussing" mean to you?

A. Forced bussing is another term we never heard of until desegregation began. To me it means — it is a code word, code term, I should say, meaning school desegregation. It means parents or others who are opposed to the use of assigning children to a school beyond walking distance from their homes as a method of achieving desegregation of schools.

It is a puzzling term, in that until the desegregation began parents didn't fight to keep their children off buses.

During my tenure as superintendent of schools, every disagreement I had with parents concerning

buses was the parents who objected to our finding that the child's home was 1.95 miles from the school, and the parent insisted it was over 2 miles and therefore the child had the right to ride that bus.

Q. Approximately how many desegregation plans have you prepared in your career?

A. I would have to say somewhere between 90 and 100.

Q. Dr. Solee, based on your expertise as a desegregation planning expert, your knowledge of the residential character of Seattle, and the tools prohibited by Section 3 of the Initiative 350, within the nearest or next nearest school concept, could you prepare a desegregation plan that would meaningfully desegregate the Seattle Public Schools?

A. I do not believe that either I or anyone else could prepare a meaningful desgregation plan for Seattle Public Schools, given the prohibitions of Initiative 350.

EXCERPTS FROM TESTIMONY
OF DR. CHRISTINE ROSSELL
(Tr., pp. 348-351)

* * *

in 1970, which showed a majority of whites claimed they would be willing to bus their children up to two hours to send them to a superior white school.

So, parents will claim they are willing to bus their kids for educational advantages, but the evidence suggests that there is a certain amount of opposition to change that occurs that may be labeled just laziness and gets redefined as other political factors become more salient.

Q. There are lots and lots of reasons why parents don't want to have their students reassigned out of what is otherwise their neighborhood school, aren't there?

A. I suspect that there are lots of reasons that parents will claim, and may in fact actually believe.

Q. You talk about some of those reasons on page 15, don't you? Why don't you just turn to the next page, again, up in the middle of the page.

You say: "We know from the experience of voluntary majority to minority bussing programs that such programs are much more successful at the secondary level than at the elementary level, where parents' concern with their children's safety is greater and their children's participation in curriculum decisions less."

That is one of the other factors that parents have in their mind, isn't it, the safety of their children?

A. Yes. Let me point out a majority to minority bussing program is a desegregation program.

Q. I realize that.

A. So that parents typically don't worry about their children's safety, unless it is a part of a desegregation program. All of a sudden that program becomes a reality, and they redefine it as an issue of safety, rather than calling it what it is.

Q. Doctor, didn't you tell me this morning that, by safety, one of the things you meant was that parents get nervous when their children are riding the bus because they are afraid it will go in the ditch?

A. That's true. It occurs when —

Q. Didn't you say —

THE COURT: Let her finish.

A. There is an interaction between the desegregation and other factors. Parents don't worry about bussing as a safety problem until they find out that the busses go into a black neighborhood. Then safety becomes an issue and they worry about things like bus accidents, which were never a concern before desegregation.

It is fascinating, the increase in preoccupation with the safety of the busses that occurs when a desegregation plan is implemented.

The ability of people to rationalize their racial fears is quite amazing.

Q. Didn't you just this morning specifically tell me parents got concerned about the safety, even in a 100% white school district —

A. I will explain to you again what I said.

Q. Didn't you tell me this morning, Dr. Rossell?

A. No. What I said is that there is an interaction between class and race and transportation, and I will explain it to you again.

A school district in which — which is completely white, in which middle class parents are asked to bus their children to a poor white neighborhood, there will also be opposition to being bussed to a poor neighborhood.

Middleclass parents do object to being bussed to lowerclass neighborhoods, so there is also class prejudice evidenced here, class and race prejudice, and you may recall I pointed out to you that white parents will be more fearful of bussing their child into a poor black neighborhood than they are about bussing their child into a poor white neighborhood, so that their class is an important factor there.

EXCERPTS FROM TESTIMONY
OF JEROME PAGE
(Tr., pp. 450-454)

* * *

A. This is a joint statement by several people from the central area, black community leaders who were making a statement of their concern in relationship to the Initiative 350, and the school plan, the Seattle School Plan.

Q. Are you a signatory to that statement, Mr. Page?

A. Yes, I am.

Q. Your signature appears on page 3, does it, of the statement?

A. Yes, it does.

Q. Were you present, sir, when the other six persons signed that statement?

A. Yes, I was.

Q. Mr. Page, to the best of your knowledge and belief, are the contents of that statement true and accurate?

A. Yes, they are.

Q. Can you briefly summarize for the Court the gist of that joint statement?

A. In general, it identifies the black community support of the Seattle Plan, as it was designed in 1977, and as it has been implemented the first year, and now the plan for the second year in '78 and '79, and it identifies the support.

One of the major reasons for that support is the equitableness of the desegregation plan.

Historically, for the last 10 or 15 years, with the Seattle School Board and the Seattle school system was delving into desegregation, the black community carried the total burden of that desegregation.

It was sort of a one-way street. We bussed out of the central area, and that is the basis of equitability in the eyes of the black community.

If there is to be desegregation plan, it must be shared equally by the community, and it was our concern that, if initiative 350 is to be implemented, then that would mean there would be a total retrenchment, and in our opinion, the black community would no longer carry that burden of voluntarily desegregating the schools.

It has just been too long we have maintained that; and also, if 350 is implemented, this would totally deny the black community the political process to be involved in developing and directly what we consider things in our best interest in this community, because it would then mandate that the school system be set up in such a way that the only bussing or the only desegregation can be maintained through the nearest or the next nearest school, which would, in essence, resegregate the school system, so it would deny us the opportunity to participate in the political process of our community here in Seattle.

Q. Mr. Page, do you recognize present in the courtroom this morning, seated behind me, and going from your left to right, three gentlemen?

A. Yes, I do.

Q. Who are they, please, beginning from your left to your right?

A. Mr. Lacey Steele, Mr. Meredith Mathews, and Rev. Fred Stevens.

MR. NEUKOM: Your Honor, for the record, the other three signatories of the statement, in the order in which their names appear, Rev. Samuel B. McKinney, Mr. Larry Gossett, and Charles Z. Smith, have commitments which has made it impossible for them to be here this morning. If necessary, they can be here later in these proceedings.

THE COURT: All right.

MR. NEUKOM: I would move the admission of Exhibit 94.

THE COURT: Any objection?

MR. MURPHY: None.

THE COURT: 94 will be admitted.

I would like to ask the witness one question.

You said with the implementation of 350, the black community would no longer carry that burden. You also spoke about in the past you felt the black community carried the burden because it was bussing out.

Are you saying that, with 350, you feel, or it was your opinion that the black community would no longer be willing to do so?

THE WITNESS: I believe so. I think if 350 is made the law of the land, then it would completely wipe out the black community's faith in the political system they have been a part of in trying to develop an equitable system, and it would say, then, turning the clock back 10 or 15 years, in which it would say, "if you feel you want any kind of desegregated system, then you carry that burden."

I think the black community, for the large part, would say, "that doesn't make sense. This is 1979. We shouldn't have to carry the burden as we did 10, 15 years ago."

THE COURT: I see. All right. Mr. Neukom, any further questions?

MR. NEUKOM: Yes.

Q. I don't think I asked the witness, and I will now, whether he adopts this statement, Exhibit 94, as his own statement?

A. I am sorry?

THE COURT: Would you repeat the question?

Q. (By Mr. Neukom) Mr. Page, do you accept this statement, Exhibit 94, as your statement?

A. Yes, I do.

THE COURT: You signed it, did you not?

THE WITNESS: Yes, I did.

THE COURT: You still subscribe to it?

THE WITNESS: Yes, I do.

EXCERPTS FROM TESTIMONY OF DR. FRANK B. BROUILLET
(Tr., pp. 569-571)

* * *

MR. HALL: Yes. Would you mind handing the witness Exhibit 2, please?

Q. Page 3 of that exhibit, Dr. Brouillet, let's walk through just briefly a couple of the sections.

Section 1 says, in part, that a school district cannot assign students to other than their nearest, or next nearest school, except in the following situations:

Exception 1 is if a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance.

In my question, I want you to exclude all of those kinds of children, and bussing for all those kinds of children, for which you are aware.

Next, the second exception, if there are health or safety hazards, either natural or manmade, or physical barriers, or obstacles, either natural or manmade, between the student's place of residence and the nearest or next nearest school.

I want you to exclude all transportation for those kinds of students in my question.

Third, if the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions, or lack of physical facilities.

I want you to exclude all of that from the bussing about which you have knowledge, the bussing, mandatory bussing, to other than nearest or next nearest schools.

I think the fifth would be perhaps voluntary cooperative programs, which might be contemplated by Section 5 of the initiative.

Now, if you exclude from all of the bussing in the state, the three hundred or four hundred thousand students bussed every day in the state, and exclude from all of that these categories of students, are you aware of any other forced bussing in the state, other than that which relates to desegregation?

A. No.

* * *

EXCERPTS FROM TESTIMONY
OF ROBERT DORSE
(Tr., pp. 675-680)

* * *

Turning to the back page of Exhibit 62, to the paragraph that Mr. Hall referred to earlier, paragraph 4 where you say — or the position paper of CiVIC says: "We will not argue whether the Seattle School Board has the authority to implement the proposed mandatory bussing program."

Now, you are familiar, are you not, Mr. Dorse, with the fact that the school districts in the State of Washington have historically had the power to assign students for the purpose of achieving racial balance; that is, prior to initiative 350, you were aware of that fact, weren't you?

A. I believe I am aware of that fact, yes.

Q. And you were familiar with the case of the Citizens

Against Mandatory Bussing versus Pulmisson, where the State Supreme Court declared that school boards did have such power?

A. I am not familiar with that case, because I wasn't involved in school affairs at that time. My children were too small.

Q. Was that case not discussed by members of your group in talking about whether or not the school board did have the power to create the Seattle Plan?

A. That might have been but not too much by me. My efforts were in decidedly other efforts, but I am sure it probably was discussed by our legal and legislative committees.

Q. Now, you indicated, Mr. Dorse, that you have children in school. So, I assume that you are familiar with the broad general powers that school boards have in other aspects of running schools, that is, you know, for example, that school boards have the power to determine who to hire and promote and where to assign teachers? You knew that?

A. Yes.

Q. That the school boards had that power and the power to pay teachers?

A. Yes.

Q. And to make curriculum decisions, basic decisions about education of the children?

A. Yes; somewhat as a board of directors that is responsible to a group of stockholders.

Q. And to determine where facilities will be put and maintained and built and removed. Powers such as that have always been historically part of the power of school boards in this state, have they not?

A. Yes.

Q. Now, I take it — would it be a fair statement to say that CiVIC had no objection to the way in which the Seattle School Board exercised all of the other powers that we have been describing, that is, hiring and firing, teachers, promoting them, deciding curriculum, school placement, facilities — you have no bone to pick with

any of those decisions, do you?

A. Not necessarily so.

Q. Well, did you attempt in Initiative 350 to restrict the powers of school boards in any way other than in — with respect to the power to assign students for achieving racial balance by mandatory means?

MR. OLIVER: Objection. That is a legal conclusion. It is what this lawsuit is all about.

THE COURT: I will accept an answer as his opinion. So, I will overrule the objection.

A. (By the witness) The main purpose, as far as I am concerned personally — I cannot speak for the organization — is that there were many — not many, but there were five primary reasons why 350 —

Q. The question, Mr. Dorse —

A. Then the answer is no.

Q. The only way in which you wanted to remove the power that local school boards historically held, was the power to assign students by mandatory means for the purpose of achieving racial balance?

A. No, that is not correct. It is for any reason.

Q. To assign them for any reason?

A. Yes. As an example, for socio-economic reasons, which could be completely other than race.

Q. Are you saying, if the school board were to decide for, say, socio-economic reasons that they would achieve the same thing that the Seattle plan is doing, that would be all right?

A. No. I am saying if they embarked upon a program of mandatory bussing, for purposes of achieving some socio-economic balance, I would be as equally opposed to that, without any regard to race or what-have-you.

Q. I see. Other than that for social-economic reasons and race reasons, that is the only —

A. No. I would have to answer no again.

Q. What else?

A. Since I have gotten into this issue, I am surprised at how many reasons supporters have come up with that school boards might decide on using forced bussing as

a tool.

Q. So, it would be fair to say, then, that you have wanted to take away the historic powers of school boards in this state to assign students for socio-economic reasons and racial reasons and perhaps others, but in no other way affect the powers of school boards historically held by them?

A. From the standpoint of an all encompassing reason, yes. The purpose was to stop the mandatory bussing of students.

MR. NOLAND: That's all the questions I have.

EXCERPTS FROM TESTIMONY
OF BEN CALEY
(Tr., pp. 735-739)

* * *

In fact, I was assuming you were one of the parents who had no racial animus in your decision-making process, where your children are going.

I will still assume that, but ask you if you don't fairly concede that, in our society, there is some racism, is there not?

A. I think yes.

Q. Even in Seattle?

There are some parents who just don't want their kids to be mixing with kids of other races?

Some?

A. Bound to be, bound to be some, yes.

Q. And that goes for white people who don't want their kids to go to schools with black children, and black parents who don't want their children to go to school with white children?

A. Yes.

Q. Are they afraid of the other race?

A. I suppose.

Q. Or other races. It is common knowledge, isn't it that there is a strain of racism in this country and in this city?

MR. OLIVER: I would object to that, "common

knowledge," Your Honor. I don't know where we are going.

THE COURT: Let me say this to counsel, I am going to say this very quickly: There is a local rule that you stand when you address the Court. If you have got something to say to me, I will hear it.

MR. OLIVER: I object. He is calling for speculation now. I don't really see the relevance.

THE COURT: Well, I am going to let him answer on the basis of his own knowledge only, not that he is an expert on what exists in Seattle; but if you can answer from your own knowledge as to whether there is a strain of racism — did you say — in the City of Seattle, an element of racism.

A. (By the witness) I didn't — would you please repeat the question? Are you referring to — are we talking about the whole country, or are we talking about the country or school system?

Q. Let me — maybe it is too much to ask about the country as a whole, but in Seattle, you have talked with a lot of people about education and where they send their kids to school, have you not?

A. Yes.

Q. You have been a leader in this whole movement to limit the authority of the school board to assign students. So, certainly in the course of that you have talked to a lot of people?

A. Yes.

Q. And have you not had people say to you things that leave you with no doubt, but that they really are just afraid of other races, and that is a motivating factor for them?

MR. OLIVER: That is hearsay. Excuse me, that is hearsay.

THE COURT: I am going to overrule it on hearsay, because I think his state of mind is an exception to the hearsay rule.

Is there a question before you that you understand?

Q. (By Mr. Noland) Let me rephrase the question.

A. During my conversations with people, during the process of gathering signatures and all of this, I found that the element of racism almost totally was non existent.

I felt that it was not even a matter of consideration, in terms of the reason for the passage of the initiative or the reasons that people may have decided one way or another to vote for the initiative.

When I went to grade school and high school here, I felt that there was no problem in regard to this; that the friends that I had at Garfield and Franklin and Cleveland and Roosevelt and Ballard all got along equally, equally as well, and there was no problem.

Q. (By Mr. Noland) I am really not asking you what your view is about even the majority sentiments. I am just going to go back to what you said earlier. I think that you forthrightly conceded that there are people, even here in Seattle, who are afraid of the other race and they just don't want their kids to be in school with other races?

A. Yes.

Q. Now, those parents — if you have a neighborhood school policy, those parents, then, have the right, do they not, to select an area of a city that will result in, insofar as possible, isolating their children from the contacts that they fear with other races? That is, in this city there exists schools which are overwhelmingly either black or white?

A. Yes.

EXCERPTS FROM TESTIMONY
OF SAM FRANKLIN
(Tr., pp. 1163, 1169, 1177, 1178, 1185)

* * *

Q. We had briefly talked about the series of letters that are attached to your affidavit. Were those considered?

A. Definitely. This was very critical in designing an initia-

tive measure that would be flexible enough to accommodate the various requirements and needs of school districts across the state, taking into account we had metropolitan areas, we had rural districts, we had suburban districts that were growing very fast, with very fast movement, changes in the population and demographics.

So we attempted to get as much input as we could into the design of the initiative, realizing to some extent the language, when it became finalized, would be carved in stone and not subject to any immediate change or the usual legislative compromises and flexibility by amendment. * * *

I recall discussing with you the fact that the term "special education" had to be broad enough to encompass, not just mental retardation and the grossly handicapped, physically handicapped children, but also other problems like — including disciplinary problems, and that is why the emotionally handicapped came in.

I do not recall specifically at what point that language was discussed or when that language was finalized, but it was after analysis by you of the federal statutes, and the provisions in RCW 28(a), which both of us had done, and trying to make this as broad and flexible as possible.

* * *

Q. Attached to your affidavit and statement are many letters that were sent out to school districts around the state.

Was the intention through these letters to make sure that the restrictions on assignments to the nearest and next nearest school not get in the way of what you saw as valid educational programs throughout the state?

A. That's correct.

* * *

Q. Now, you have acknowledged that there is racial prejudice out there some place in the state, because, for instance, CiVIC kicked out one person who expressed

some racial prejudice. Under Initiative 350, isn't it true a person carrying racial prejudice could insist on attending his nearest or next nearest school for racially motivated reasons?

A. I am sure he could.

EXCERPTS FROM TESTIMONY
OF DR. JAMES MORISHIMA
(Tr., pp. 1298-1299)

* * *

Q. Do you, based upon your educational and professional background and experience, have an opinion as to whether or not racial bias or racial motivation is a factor in the white community's opposition to bussing for desegregation?

A. Yes, I do.

Q. What is that conclusion?

A. The conclusion is that racial bias did enter into the equation.

MR. NOLAND: Thank you. That's all I have.

* * *

EXCERPTS FROM TESTIMONY
OF DAVID ARMOR
(Tr., pp. 1715-1716)

* * *

Were these studies specifically designed — did they probe for the existence of any other reasons, such as racial bias?

A. Well, I did a measure of racial bias, which I might — which I am measuring indirectly — perhaps in the most relevant way for a school case, is whether they objected to minority students being assigned in large numbers to their own neighborhood schools. I mean, that was my measure of racial bias as relative to the school situation, and that was the measure I used to make a judgment; but whether racial bias is the main factor or whether perhaps other issues are the main

factors in causing whites to either oppose mandatory busing or to say that they would withdraw their child from the school district if they were mandatorily reassigned —

Q. But it was the conclusion stated in your August, '78, paper that whites don't object to minority students being assigned to their schools?

A. I didn't say all whites. I want to make that perfectly clear. There is a fraction — I think in L.A. it was about 20 percent, and there is a fraction in any study of whites' attitudes towards race. Even in the last few years, there is a fraction of whites that are racially intolerant and objected to being reassigned on racial grounds.

THE COURT: You spoke about a figure in the Los Angeles area. Was that — did you say that about 20 percent of the white parents would object to having minority students transported into the so-called white schools?

THE WITNESS: Into their child's present neighborhood school.

THE COURT: I see.

A. (continued) Now, I would call that group — now, there may be — to be fair on this, there may be general objections to busing that are not directly related to racial tolerance, but given the history of race relations and given where we are on this issue, I would — operationally I would see no problem in viewing that group as a group with possibly racial bias feelings and objecting on racial grounds, not on mandatory reassignment grounds.

EXHIBIT 6

PREFILED WITNESS STATEMENT OF RICHARD ALEXANDER

I am the most senior member of the Seattle School Board, having held office since December 1969, and since December 1973 have been the current President of the

Board. I have personal knowledge of the facts stated herein and I am competent to testify thereto.

I have read the "Facts Relating to the Seattle School District" contained in Plaintiffs' Memorandum herein dated December 5, 1978 at pages 4-20. I am personally familiar with such facts, believe they are stated accurately, and incorporate the recital of those facts in this affidavit as if they were fully set forth in this affidavit.

The Seattle School Board's desegregation goals for 1975-76 and 1976-77 (adopted unanimously by the same Board as presently exists) provided that voluntary desegregation strategies would be emphasized, with mandatory strategies to be invoked by the Board if necessary as a backup.

I recall substantial publicity around the time the Board adopted its June 1977 definition of racial imbalance (and began a public involvement process to culminate in a December 1977 choice of desegregation strategies), to the effect that to meet the goal of eliminating racial imbalance desegregation strategies would of necessity include some mandatory transfer elements. I believe the Board realized and communicated at that time to the public that the goal of eliminating racial imbalance could not be achieved through entirely voluntary means.

The District's long experience with voluntary desegregation measures, and the data compiled over the years and during 1977, made it clear to everyone familiar with the school system that, whatever our preference, desegregation could not be achieved through solely voluntary means.

The Seattle School Board consequently adopted a plan to desegregate Seattle's schools because of (a) community support, (b) the Board's longstanding commitment to desegregation for educational and legal reasons (to provide opportunities for all children to experience significant contact with children of other backgrounds) and (c) the Board's determination to retain control of the school system (rather than risk losing control to the courts, as have many other school districts).

II. FACTS RELATING TO THE SEATTLE SCHOOL DISTRICT[1]

For over three decades, and especially since the famous *Brown* decisions of 1954[2] and 1955,[3] the Seattle School District (sometimes called the "District" herein) has moved toward the racial desegregation of its schools. These decades of sometimes timid, other times determined, but almost always controversial action by the District culminated in the Board action which led to the promulgation of Initiative 350 and this lawsuit.

Lawsuits against the District have been common as the District felt its way along the uneasy path toward integrated education. They are of public record. Some of the more prominent include:

—*Campbell et al. v. Seattle School District No. 1*, Cause No. 9171 before the United States District Court for the Western District of Washington (suit to require "an acceptable plan to achieve meaningful racial balance in the public schools throughout Seattle * * *" (Complaint, page 6) filed on about August 28, 1970 and dismissed October 12, 1972);

—*State ex rel. Citizens Against Mandatory Bussing v. Brooks*, ("*CAMB I*"), 80 Wn.2d 121, 492 P.2d 536 (1972) (concerning the sufficiency of a petition to recall School Board members who voted for a controversial multi-racial middle school and mandatory busing program; the court in part held,

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[1]As of the date of this Memorandum, there are three school district plaintiffs—Seattle School District No. 1 of King County, Washington; Tacoma School District No. 10 of Pierce County, Washington and Pasco School District No. 1 of Franklin County, Washington. The latter two districts were authorized by their Boards of Directors to enter this lawsuit only within the last week. By that time, much of this Memorandum had been prepared. Rather than await information from those districts for inclusion in this document, it was decided to proceed with its preparation and filing. Information as to the remaining Districts will be added to this case at a later date.

[2]*Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) ("Brown I").

[3]*Brown v. Board of Education of Topeka*, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (1955) ("Brown II").

at least within the context of the case, that the distinction between *de jure* and *de facto* segregation "is of no consequence." 80 Wn.2d at 128);

—*Citizens Against Mandatory Bussing v. Palmason*, ("*CAMB II*"), 80 Wn.2d 445, 495 P.2d 657, 50 A.L.R. 3d 1076 (1972) (a companion case to *CAMB I* — except here plaintiffs unsuccessfully asserted, to a unanimous court, a "right" to have their children attend neighborhood schools as a means of defeating the District's modest middle school mandatory transfer plan. That plan was held to be "a proper exercise of the board's discretionary powers." 80 Wn.2d at 459. The court held "it was the duty of the school board to act in the best interests of the majority of students" and the middle school plan was consistent with the board's discharge of that duty. 80 Wn.2d at 457);

—*Dawson v. Troxel*, 17 Wn.App. 129, 561 P.2d 694 (1977) (suit unsuccessfully challenging the District's policy denying majority race (white) children the option of transferring out of the Garfield High School attendance area; this policy was designed to promote the desegregation of Garfield. Here too, the court inferred a duty of the District to act to complete a "desegregation process [in] no longer than is absolutely necessary." 17 Wn.2d App. at 133);

—*Coney v. Seattle School District No. 1*, Civil Action No. C75-650M before the United States District Court for the Western District of Washington (concerning the same policy challenged in *Dawson* and demanding that Garfield be closed, school boundaries be changed to require all Seattle high schools to have the same ratio of black and white students and that the neighboring school districts be drawn into a "regional desegregation plan." Complaint, pages 16-17, filed about September 9, 1975 and dismissed May 6, 1977);

—*Simmons v. Seattle School District No. 1*, Civil Action No. C76-134V consolidated with

—*Nakamura v. Seattle School District No. 1*, Civil Action No. C76-135V before the United States District Court for the Western District of Washington (these two cases also involved the District's

Garfield transfer policies and sought roughly the same relief as *Coney*. *Simmons* and *Nakamura* were filed about February 27, 1976. They were dismissed July 29, 1977);

—Numerous complaints have been filed with the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare ("HEW"). Some of these complaints involved teacher assignments, bilingual education requirements ("*Lau*" compliance — named after a related lawsuit (*Lau v. Nichols*, 414 U.S. 563, 39 L.Ed.2d 1, 94 S.Ct. at 786 (1974)) in which the District was not a party) and most significantly for the instant litigation, the National Association for the Advancement of Colored People ("NAACP") complaint filed with OCR on April 22, 1977 (challenging the segregation of the Seattle Public Schools and calling upon OCR to terminate all federal funding to the District until it is desegregated. This complaint was settled by a Memorandum of Agreement between OCR and the District on June 7-8, 1978 which bound the District to implementation of The Seattle Plan); *see generally*, Affidavit of Marlaina Kiner and attached exhibits which are all in Exhibit I to plaintiffs' Complaint; the NAACP complaint is also attached as Exhibit A to the affidavit of Cheryl Bleakney.

—*Roe, et al. v. Seattle School District No. 1* ("Roe I"), King County Superior Court Cause No. 838291, and *Roe, et al. v. Seattle School District No. 1* ("Roe II"), King County Superior Court Cause No. 839530, filed about December 13, 1977 and January 13, 1978, respectively (these cases challenged and sought to enjoin the District's adoption and implementation of The Seattle Plan. The cases were consolidated and dismissed pursuant to the District's motion for summary judgment. They are presently on appeal to the Washington State Supreme Court);

—*Velikanje, et al. v. Seattle School District No. 1 and Washington State Department of Ecology*, Thurston County Superior Court of Washington Cause No. 78-2-00066-2, filed in July 1978 (seeks to enjoin operation of The Seattle Plan on the theory

that the District did not prepare an environmental impact statement for it. Trial of this matter is presently set for April 26, 1979).

There was also a disruptive — but unsuccessful — effort to recall several Board members who voted for the middle school and mandatory busing plan of 1971-72. *See State ex rel. Citizens Against Mandatory Bussing v. Brooks, supra.* For a few years thereafter, the District's resolve to proceed with desegregation of its school wavered.

In 1975, for the first time in its history, Seattle voters failed to pass the District's special excess levy which would have provided 42 percent of the District's 1975-76 operating budget. As a result, and to obtain stability in school funding, in 1976 the District filed suit challenging the validity of the special excess levy system under the Washington State Constitution, Article IX, Sections 1 and 2. The challenge was successful at the trial court level (the "Doran decision") and in the Washington State Supreme Court.[4] The Washington State Legislature, in the wake of the Doran decision, limited appropriations to the District and placed a "lid" on the funds the District may derive through special excess property tax levies.[5] This has seriously limited the District's ability to pursue "voluntary" desegregation strategies which are far more expensive per pupil than The Seattle Plan strategies.

Effective August 1976 the Board hired a new Superintendent, Dr. David L. Moberly, as the District's chief administrative officer. Believing then that the District's financing might be more stable and ample as a result of the Doran decision, and that it was educationally and morally right to do so, the Board directed their new Superintendent to develop and implement a desegregation program for the Seattle Public Schools.

In the fall, winter and spring of 1976-77 the District embarked on development of a much publicized magnet

[4]*Seattle School District No. 1, et al. v. State, et al.*, 90 Wn.2d 476, 585 P2.d 71 (1978).

[5]RCW 84.52.052 *et seq.*

school program. The program permitted students to voluntarily transfer from their "neighborhood" schools to a "magnet" school which contained an educational program designed to attract students to it. The hope was that a sufficient number of transfers would occur to make the program educationally successful, and at the same time reduce the level of minority race segregation (or "racial imbalance" or "racial isolation") in both sending and receiving schools.

During its implementation in the 1977-78 school year, the magnet program was successful in promoting significant new student movement, much of which positively affected racial balance. However, the magnet-only strategy was very expensive and seemed incapable of eliminating racial imbalance in the District's schools. While racial balance in several schools improved, the number of racially imbalanced schools in the District actually increased.[6] Something more than mere voluntary transfers was obviously needed — at least as a back-up possibility.

The magnet program also drew criticism from the minority community because it appeared to be racist,[7] caused further crowding of some of the District's already overcrowded racially imbalanced schools, and required large expenditures of scarce resources for the purpose of inducing voluntary movement instead of for upgrading basic educational programs. Minority leaders pointed out that significant numbers of minority children could scarcely be expected to voluntarily transfer out of mostly minority schools at the same time large expenditure increases for the educational programs in those schools were occurring in order to attract majority students.

The optimism which some had for the magnet program (combined with the modest but still important man-

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[6]*See* page 17 of plaintiffs' Complaint and Exhibit D to the Affidavit of David L. Moberly.

[7]Its success being in part dependent upon suppositions as to what types of educational programs would attract minority and majority students — as necessary to improve racial balance. *See generally* the Affidavit of Cheryl Bleakney, pages 6-80.

datory busing component of the 1972 middle school program which remained in effect through the 1977-78 school year)[8] began to wane.

More and more citizens voiced their impatience with what they viewed as the District's procrastination in moving toward actual desegregation. They believed each year of avoiding the issue brought another year of lost educational and moral opportunity.

Groups such as the National Association for the Advancement of Colored People ("NAACP"), American Civil Liberties Union ("ACLU"), Council of Churches of Greater Seattle and others threatened a comprehensive federal court suit against the District if it did not take conclusive action to desegregate its schools. The NAACP actually filed an administrative complaint[9] under Title VI of the 1964 Civil Rights Act with the Office for Civil Rights of the United States Department of Health, Education and Welfare in April, 1977.

On May 20, 1977 the Mayor of Seattle and the Presidents of the Seattle Chamber of Commerce, Seattle Urban League and Municipal League wrote Don Olson, then the President of the School Board, urging the Board to define racial isolation and establish measurable goals leading to its elimination "prior to a Court ordered and mandated desegregation remedy." This letter is Exhibit C to the Affidavit of David L. Moberly, and Exhibit 3 to the Affidavit of Cheryl Bleakney.

At the same time, the School Board continued its search for ways to meet the educational and moral imperatives of desegregation within the context of a community consensus. The Board wanted to accomplish desegregation peacefully, without the rancor which had torn some other major Northern cities apart. The Board also wanted to accomplish desegregation through a process which they and the community designed and controlled —

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[8]*See Citizens Against Mandatory Bussing v. Palmason, supra.*

[9]A copy of this complaint is attached as Exhibit A to the Affidavit of Marlaina Kiner which is Exhibit I to Plaintiffs' Complaint in this case.

not a process subject to the uncertainties and loss of local control involved in court-ordered desegregation. They knew the price other school districts had paid when responsibility was abdicated and desegregation was left to the courts.

On May 11, 1977 the Board adopted eighteen suggested criteria for evaluating future desegregation plans. On June 8, 1977, the Board adopted Resolutions 1977-8 and 1977-9[10] which for the first time

(a) defined "racial imbalance" as "The situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body;"

(b) committed the District to the elimination of "racial imbalance" by the beginning of school year 1979-80, subject only to Board approved educationally sound exceptions;

(c) directed the formulation of a process of administrative planning and public participation in the preparation of a plan for School Board consideration; and

(d) established December 15, 1977 as the deadline for planning, discussion and a Board vote on the adoption of desegregation strategies.

On July 27, 1977 the Board prioritized its desegregation plan criteria to require that equity of movement between minority and majority students, and preservation of ethnic identity and cohesiveness be features of any District plan.

During the summer and fall of 1977 the planning process required by Resolution 1977-9 was given massive publicity. District staff prepared four plans for public review; the Urban League of Seattle submitted a fifth one.

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[10]The criteria are attached as Exhibit A to the Affidavit of David L. Moberly filed herewith; Resolutions 1977-8 and 1977-9 are attached to the Complaint filed in this matter as Exhibits D and E.

Over 30 public hearings were held across Seattle to discuss the intertwined issues of education, desegregation, finance and planning. The five plans were thoroughly discussed, as were the merits of voluntary and mandatory strategies to accomplish the elimination of racial imbalance. All five plans necessarily contained some element of mandatory student assignment — either as a backup to voluntary transfers or as an initial proposition — in order to guarantee the elimination of racial imbalance. The public was, therefore, made aware that some element of mandatory assignments was critical to the success of any viable desegregation plan.

By the end of November 1977 the District's staff had synthesized the five plans and public discussions into a proposal which in early December was submitted in written form to the Board. The proposal from Superintendent Moberly contemplated the pairing or combining in groups of three (triads) most of the city's minority segregated elementary schools with majority schools. Grade reconfiguration within the pairs or triads (*e.g.*, all students in grades 1-3 from two paired schools would attend, as their "fixed assignment," one site, all grades 4-6 students would attend the other site) were designed to eliminate racial imbalance in each affected school. New "feeder patterns" from the desegregated elementary schools to secondary schools would then accomplish "phased-in" desegregation of the secondary schools. An integral feature of this proposal was the availability of educational options as alternatives to "fixed assignments."

The educational and fiscal consequences of the plan were thoroughly considered. The plan met the Board's basic criteria and goals — it would substantially reduce racial imbalance in the District's elementary schools and begin elimination of racial imbalance in the secondary grades.

Over the years, while the District has attempted to deal with the issue of desegregation, some of the loudest voices in opposition to the District's actions have been majority race parents who, for various reasons, have resist-

ed any District efforts to assign their children to schools other than their "neighborhood" schools. This is really what inspired the two *CAMB* cases.[11] While the cast of characters may have changed somewhat between 1971-72 and December 1977, the basic issue had not: Would the District permit all children to attend their "neighborhood" schools — virtually guaranteeing the perpetuation and worsening of racial segregation in the public schools of Seattle — or would it assign some of them to more distant schools? This, however phrased, has always been the fundamental question.

Indeed, this was the main issue in still more public hearings held by the Board during the first weeks of December 1977. The Board made several material changes in the draft plan as a result of these hearings.

Despite the ongoing publicity given the possibility — even the probability — that mandatory measures would be required to actually eliminate racial imbalance in the District; despite the fact that all five of the plans studied in the summer and fall of 1977 contained, as outlined in publications sent to all school parents,[12] some mandatory aspect; despite even the evident logic of some mandatory features, plaintiffs in the *Roe I*, *Roe II* and *Velikanje* cases[13] did not realize until early December 1977 that the District was serious about eliminating racial imbalance — through mandatory strategies if necessary. * * *

The stage was now set for the December 14, 1977 vote

[11]It was not a mere coincidence that plaintiff in those cases was named "Citizens Against Mandatory Bussing" — the bus being the vehicle used to realize desegregation by transporting children for a portion of their school careers from their traditional "neighborhood" assignment to a more distant school. The successor to CAMB in the District's more recent desegregation litigation is CiVIC, or Citizens for Voluntary Integration Committee. Again, it is no coincidence that CiVIC's very name alludes to the racial integration-segregation issue involved in plaintiffs' challenge to Initiative 350.

[12]*See, e.g.*, Exhibit C to the Affidavit of David L. Moberly.

[13]As alleged in plaintiffs' verified Complaint, plaintiffs in those three cases were for the most part, if not entirely, members of CiVIC or were acting in concert with CiVIC and members thereof. CiVIC and CiVIC members were the principal proponents of Initiative 350.

of the Board. Watching closely were the NAACP, ACLU, Council of Churches and others threatening litigation if the Board did not decisively act. On the other side, there was the newly formed Citizens for Voluntary Integration Committee, or CiVIC. On the morning of the December 14 vote, members of CiVIC attempted to enjoin the vote through a lawsuit filed the previous day.[14] Following a hearing, Superior Court Judge George H. Revelle denied their motion.

That afternoon the Board adopted Resolution 1977-28,[15] and The Seattle Plan which implemented the Resolution, by a vote of 6-1. The pairing-triading, fixed assignment, and educational option aspects of the Plan remained essentially intact.

The Superintendent was also authorized to continue developing and refining The Seattle Plan consistent with the strategies and implementation time lines outlined in it, and subject to continuing Board review, approval, and action where needed. The Board also required periodic progress reports.

Following additional community involvement, and action on specific aspects of the plan, The Seattle Plan was finally adopted by the Board in its meetings of March 8, 22 and 29, 1978.[16]

On January 13, 1978 plaintiffs filed a new lawsuit ("*Roe II*") — Cause No. 839530) challenging the Board action of December 14, 1977. *Roe I* and *Roe II* were subsequently consolidated into one action. * * *

The *Roe I* and *II* plaintiffs' and CiVIC's efforts in King County Superior Court failed to halt implementation of The Seattle Plan. The District's motion for summary judgment in the *Roe* cases was heard in late spring of 1978. Judge Frank D. Howard dismissed with prejudice all but one of plaintiffs' claims in the *Roe I* and *Roe II* lawsuits (King County Cause Numbers 839530 and 838291). A claim charging that the District violated Washington's

[14]"*Roe I*" — Cause No. 838291.

[15]Attached as Exhibit F to plaintiffs' Complaint.

[16]*See* Exhibit H attached to the affidavit of David L. Moberly.

State Environmental Policy Act ("SEPA;" RCW 43.21C) in failing to prepare an Environmental Impact Statement (EIS) in connection with the desegregation plan was dismissed without prejudice due to plaintiffs' failure to join an "indispensable party," the Washington State Department of Ecology.

Undeterred, plaintiffs and CiVIC appealed the Superior Court rulings to the State Supreme Court and filed a new lawsuit in Thurston County Superior Court against the District and the Washington State Department of Ecology ("DOE") (*Velikanje v. Seattle School District No. 1, et al.*, Thurston County Cause No. 78-2-00066-2). The new suit charged both the DOE and the District with violation of SEPA in connection with DOE's exemption of desegregation activities from EIS requirements and the District's subsequent adoption of desegregation plans without an EIS. Neither the appeal nor the Thurston County lawsuit have been expeditiously pursued, although the District has deposed a representative plaintiff in the Thurston County litigation.

During the *Roe* litigation, CiVIC President Robert Dorse was deposed by the District. At that time, he acknowledged CiVIC was the organization behind the *Roe* cases and Initiative 350, and that Initiative 350, then being circulated for signatures, was designed specifically to prevent the "mandatory" aspects of The Seattle Plan or of any other similar plan.[17]

CiVIC gathered the required signatures for Initiative 350, and in July, 1978 the measure was filed and placed on the November ballot.

CiVIC's statewide campaign in favor of Initiative 350 belied the group's name and claim of support for "voluntary integration." CiVIC strongly criticized The Seattle Plan's transportation costs, even though the costs of a "voluntary" desegregation program would be higher. It also criticized the inconvenience of the bus ride to school — which, of course, is the same whether the ride is

[17]*Roe I* and *Roe II*, *supra*, Dorse deposition, p. 84; Exhibit C to the affidavit of Michael W. Hoge.

voluntary or mandatory. Thus, the cost and convenience issues were in reality arguments against desegregation itself. In the last stages of the campaign, CiVIC also attempted to create a "favorable" election climate by roundly denouncing the Washington State Superintendent of Public Instruction's encouragement of voluntary interdistrict desegregation efforts. CiVIC took the position that desegregation has not worked for 24 years — the time since the *Brown* decision.[18] * * *

On October 19, 1978 the Washington State Board of Education adopted a policy statement which revised the State Board's previously adopted definition of "racial imbalance" in Washington's public schools.[19] The new definition is consistent with the one adopted by the Seattle School District in June, 1977. That same day, the State Board by resolution formally expressed its concern for the educationally harmful effects of Initiative 350.[20]

On October 25, 1978 the Seattle School Board, remaining committed to full implementation of The Seattle Plan, passed the following motion directing the District's administration to develop a resolution regarding planning for 1979-80.[21] The motion reiterated the Board's previous findings regarding the educational desirability of The Seattle Plan:

> Given the successful beginning of school this fall and the Board's previous determination that equitable, certain, and educationally sound elimination of racial imbalance in the Seattle Public Schools is most economically accomplished through a system of redesigned attendance areas coupled with educational options for students, I move the administration continue toward meeting the goals of Resolution 1977-8 by developing a resolution regarding desegregation planning for 1979-80.

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[18]*See generally* the affidavit of Cheryl Bleakney, at pages 15-18, and page 24 of the deposition of Hal Velikanje, attached as Exhibit D to the affidavit of Michael W. Hoge.

[19]Exhibit N to plaintiffs' Complaint.

[20]Exhibit O to plaintiffs' Complaint.

[21]Exhibit H to the affidavit of David L. Moberly.

The resolution shall be prepared for Board discussion on November 8 and possible adoption on November 15, and shall provide for:

(a) a time line for desegregation planning for the 1979-80 school year;

(b) the role of the Board in the planning process;

(c) a process of citizen involvement and participation in the planning; and

(d) coordination of educational planning, comprehensive facilities planning, and desegregation planning.

* * *

On November 8 the Board voted 5-0, with two members absent, to authorize its attorneys to challenge the constitutionality of Initiative 350.[22] Later in the November 8 session, the Board received a preliminary report from the administration indicating the Board's goal of eliminating one-half or more of the system's racial imbalance has been substantially exceeded.[23]

On November 15 the Board reviewed its decision to authorize litigation challenging Initiative 350, and this time voted 6-1 to authorize this lawsuit. The Board also adopted, in slightly modified form, the resolution directed to be proposed in October and first discussed on November 8, to continue the District's move toward fulfillment of its June 8, 1977 commitment to desgregate Seattle's schools.

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[22]Pertinent portions of the minutes of the November 8 meeting, including statements made by Board members prior to the vote, are attached as Exhibit J to the Affidavit of David L. Moberly.

[23]*See* Exhibit J to the Affidavit of David L. Moberly.

EXHIBIT 7

PREFILED WITNESS STATEMENT OF CHERYL BLEAKNEY

I was appointed to the Seattle School Board in April of 1972 to serve the unexpired term of Dr. Robert Tidwell, who had resigned. I was reelected to a six-year term in November 1975. I have personal knowledge of the facts stated herein, and I am competent to testify thereto.

Historical background

There has been a long-standing commitment to desegregation by past Seattle School Boards. That commitment has certainly been reflected in actions of the Board during my tenure in office.

One of the first official actions I participated in was the vote to implement the middle school desegregation program. The State Supreme Court had cleared the way for that action in the Citizens Against Mandatory Bussing ("CAMB") case on April 6, 1972. That desegregation effort was centered in four middle schools — Eckstein, Hamilton, Wilson and Meany/Madrona. Its success was dependent upon, and heavily emphasized, recruitment of volunteer student participants. It also contained a mandatory backup based on randomly selected geographical points with the requisite number of students to be drawn in around those random points. The School District gave its best effort, augmented by many citizens, to recruit volunteers. At no time in the six-year history of the middle schools, however, have we been able to draw enough students to desegregate the middle schools through solely voluntary means.

This has meant mandatory student assignments each year of approximately half the students necessary to desegregate those schools.

As indicated by the District's long-standing Voluntary Racial Transfer ("VRT") program (in effect since 1963) and the 1972 middle school program just described, the Seattle School Board has demonstrated a real commitment to desegregation/integration and to its

accomplishment through voluntary means. That commitment has not diminished during my term on the Board. However, various political events have affected the zeal with which we have pursued the commitment to achieve desegregation.

The middle school desegregation program was to have been "Phase I" of a plan designed to desegregate all of Seattle's public schools. The initial injunction against implementation of that plan by order of King County Superior Court Judge William J. Wilkins on August 10, 1971 (a decision which was unanimously reversed by the State Supreme Court — almost one year later), the April 1973 recall election against four Board members (who voted for the middle school desegregation plan and who were narrowly retained in office by the recall vote) and the vehement attacks by CAMB (the plaintiffs in the April 1972 Supreme Court decision and the sponsors of the recall vote) had a sobering influence on future actions of the Board. Those political realities, plus the requirement of a 60 percent majority vote to pass the District's annual special excess levy, which raised an average of more than one-third of the District's necessary operating funds, probably explain why "Phase II" was never implemented.

The Board did, however, continue to state its goal of desegregating Seattle schools, and it instituted a number of related programs and actions with varying degrees of success. On June 12, 1974, the Board adopted Resolution 1974-14, which called for: (1) The desegregation of Garfield High School through a combination of cancelling all transfers out of Garfield which did not aid desegregation, a redrawing of attendance boundaries, and establishment of exemplary academic programs; (2) Commitment to multiracial schools; (3) The pairing of each heavily minority elementary school with a predominantly white school to develop informal contacts and exchanges of students; (4) A boundary realignment study; and (5) A continuing commitment to the VRT program.

The implementation of this resolution provided only minimal success. Garfield High School did experience a reduction of minority racial imbalance from 85.2 percent mi-

nority in 1973-74 to 72.5 percent minority in 1975-76. The pairing of elementary schools did not appear to have any appreciable effect on segregation in the elementary schools, and was substantially abandoned in the 1975-76 school year, a victim of the 1975 special levy election defeat which caused the gutting of many School District programs. The boundary realignment study indicated there was little likelihood desegregation could be accomplished through redrawing boundaries.

The School District was not successful in increasing the number of VRT's. During the 1975-76 school year the Board had authorized a program of "Focus" schools, with added resources and special emphasis to attract voluntary movement. It was not very successful, and was abandoned after one year. The overall desegregation program continued to be for the most part a one-way trip, with minority (especially black) students constituting most of the transfers.

Three new Board members were elected to the Board in the fall of 1975; the Board continued its commitment to desegregation/integration. In the winter and spring of 1976 the Board developed for the first time explicit long-range goals for the School District. Desegregation was expressed as a major priority in those goals.

During that same period, the Board was actively recruiting a new Superintendent. One of the screening criteria used in selection of the Superintendent was "ability to work in a multi-racial setting." Much of the time spent in interviewing the final candidates for Superintendent centered on discussion of and approaches to desegregation. Desegregation was clearly a high priorty of the Board (the same Board members who presently serve). Dr. David Moberly of Evanston, Illinois, was selected as Superintendent in May of 1976, assuming his full duties in August of that year.

In selecting Dr. Moberly it was the expressed prevailing opinion of the Board that we believed in integration as an educational and ethical goal. In addition, we have been and are also aware of increasing legal pressures on us to desegregate our schools. We also observed what was hap-

pening in this regard to other northern and western school districts.

During the summer of 1976 the Board worked by Dr. Moberly to develop first-year program and planning objectives. Voluntary desegregation was the first priority. The Board and Superintendent met in October 1976 at Providence Heights with Dr. William Maynard, who had been appointed to the newly created position of Director of Desegregation. We reviewed a slide presentation which had been prepared by Dr. Maynard and discussed planning assumptions for an intensified desegregation project for the 1976-77 school year.

The School District's desegregation efforts have been aided by a variety of citizen committees. In fall of 1974 the District-Wide Advisory Committee on Desegregation ("DWAC") was instituted to advise the then Superintendent on desegregation matters. This committee has had a very active role in the development of the District's Magnet Plan and ultimately The Seattle Plan.

During the fall and winter of 1976 the Committee was chaired by Dan Levant. Mr. Levant and members of the Committee grew increasingly critical of the route the administration was following in its desegregation planning for the magnet school program. They were particularly unhappy about the Superintendent's directions to staff in late 1976 which limited any desegregation planning to voluntary student movement only. This criticism reached its peak in a December 1976 confrontation with members of the School Board and DWAC. Mr. Levant resigned as Chairman of DWAC in late January of 1977.

Other community groups also expressed grave reservations with the magnet concept. In addition to DWAC's opposition, the Board heard opposing statements from the Seattle Urban League, the City of Seattle's Human Rights Commission, the Church Council of Greater Seattle, and the Central Area School Council, as well as a number of individual religious and minority leaders. Basically, they reflected concern over the issues of fairness in the distribution of funds for a magnet program. There was an expressed fear that large sums of money were being

invested in programs to attract white students who would mainly be from advantaged homes where parents were motivated to seek out special programs. At a time of diminishing resources, this meant fewer dollars for compensatory programs for disadvantaged students (many of whom are those least able to help themselves). There was also concern about fairness — that minority students would be disproportionately forced out of their more crowded schools to make room for white students, and that enriched programs, such as the magnet programs, be equally available to all students. These groups were also expressing resentment that the School District was trying yet another approach to voluntary desegregation, when the District's record to date in this regard had not been very successful. Many perceived this as yet another delaying tactic by the Board.

As the District embarked on the magnet plan for school year 1977-78, I must admit to some personal reservations as to whether or not a purely voluntary plan could succeed. Three of my children have been participants in the VRT program. They have a combined total of 26 years in Seattle Central Area schools, beginning with 1968. I have worked exceedingly hard to recruit other families to the program, but without much success.

Nonetheless, it seemed important to give one last great effort to accomplish our goal of desegregating the Seattle Public Schools through voluntary means. Both the School District and the community at large gave tremendous support to the magnet plan, but it became increasingly clear that it would not alone cure desegregation of our schools. Exhibit 8 is two tables summarizing the results of the voluntary desegregation movement in the District through 1977-78 and the numbers of schools racially imbalanced in selected years.

In spring 1977 the Board's Desegregation Committee (consisting of Board members Dorothy Hollingsworth, Suzanne Hittman and me) sought administrative preparation of contingency plans as a part of the District's desegregation effort. We wanted the District to be prepared with backup planning if the Magnet Plan failed.

In the meantime, legal threats to the District had become more imminent. The National Association for the Advancement of Colored People ("NAACP") had filed charges in April 1977 with the United States Department of Health, Education and Welfare's Office for Civil Rights, alleging acts of intentional segregation by the District. The American Civil Liberties Union threatened comprehensive desegregation litigation unless the Board took satisfactory action.

In prior discussions of the magnet plan, the Board had talked only in vague terms about reducing minority student segregation — racial isolation. There were no specific percentages established and there was no way of adequately measuring success or failure. This caused some problems in the planning for backup measures, since it was difficult, if not impossible, to know what would trigger those measures. As backup strategies were examined, it became increasingly evident the District was severely limited in the types of desegregation strategies it could employ — particularly when there were no guidelines from school to school as to what our specific goals were, and no guidelines as to building capacity. It appeared wasteful and self-defeating to make mandatory "backup" assignments of students to programs which had been uniquely designed to attract students with special interests or talents.

In examining the results of magnet recruitment, it also became evident that racially imbalanced schools could not absorb all the majority race students necessary to desegregate them without becoming hopelessly overcrowded. The racial minority population in those schools could, of course, be encouraged to transfer out, but minority children already accounted for the bulk of the District's VRTs. We could not logically expect our minority children to expand their voluntary efforts. Nor could we also expect them to voluntarily leave schools which we were upgrading (to attract majority students) in order to make room for the majority students.

Another of my concerns, and that of several other Board members, was the basis of future funding for schools. It was increasingly apparent that our funding

sources were going to be limited as a result of Thurston County Superior Court Judge Doran's school funding decision of January 1977, and subsequent action of the Legislature in 1977. It was uncertain whether we could afford the rather expensive magnet programs, and whether it was a fair allocation of scarce resources to use them to entice student movement rather than to meet student needs.

I had looked at Tacoma's so-called voluntary plan, but it appeared to offer little potential for us. Tacoma had acted in 1968 to close two predominantly minority race schools. One of the schools was reopened as a magnet-type option with enrollment strictly regulated to limit the number of minority students accepted. The minority students displaced by the two closures were allowed to transfer into other predominantly majority schools, but they were, in effect, mandatorily moved out of their neighborhood schools.

To accomplish something of a similar nature in Seattle would require the massive closures of minority schools or a force-out of minority students from existing schools so as to make room for majority students. In other words, a voluntary plan for majority students and a mandatory one for our minority students. In contrast, under the Board's current desegregation planning criteria, the burden for desgregation is to be borne equitably among the majority and minority students. I believe it a credit to all citizens who worked on The Seattle Plan that serious consideration was never given to any plan which would unfairly burden our minority children.

Adoption of The Seattle Plan

All of this background and knowledge of events contributed to the Board's decision on June 8, 1977 to adopt Resolutions 1977-8 and 1977-9, which resolutions are Exhibits 9 and 10, respectively. It was clear by this time that we could not measure the success of any desegregation effort until we had defined racial imbalance. It also seemed clear that it would take a firm commitment to the elimination of racial imbalance by a time certain to avoid

lengthy and divisive litigation by civil rights groups seeking to compel desegregation.

The Board had numerous discussions with our attorneys during the winter and spring of 1977, trying to assess our vulnerability to charges of segregatory acts, and the risks involved in federal court action. I believe we all wanted to avoid such time-consuming and expensive litigation and the likelihood of court intervention in the educational management of our School District. Only one Board member remained unconvinced that our action was necessary to avoid this eventuality.

A majority of the Board seemed to recognize that some mandatory strategies (either initially or as a backup to a voluntary plan) would be necessary to achieve our desegregation goal. In the spring of 1977 Superintendent Moberly was quoted to this effect in the daily papers, on radio and TV. It was also reflected in the heated debate by the Board prior to adoption of the two June 8 resolutions. There was considerable public support for our adoption of the resolutions, including a letter to the Board in late May 1977 from the heads of the Seattle Chamber of Commerce, Municipal League, Urban League and then Mayor, Wes Uhlman. A true copy of this letter is Exhibit 11. I recall vocal opposition from only one source — West Seattle citizen Larry Penberthy.

In May of 1977 the Board, with the recommendations of DWAC (chaired then by Dr. Richard Andrews) had adopted criteria for judging desegregation plans. These criteria were further refined by the Board on July 27, 1977, with two of the criteria labeled as essential to any plan: Equity of movement between minority and majority students, and preservation of ethnic identity. We recognized the other criteria would be met to varying degrees by different plans, and some would require trade-offs. The criteria were printed and distributed to the public. They were used in a very systematic way by DWAC to point out the pros and cons of the five alternative plans which were presented to the public in the fall of 1977.

There was extensive public involvement in the evolution and examination of the five models and the eventual

adoption of The Seattle Plan. Groups and individuals were invited to submit plans for consideration. The Seattle Urban League did submit a new version of their 1964 Triad Plan. (The original had been proposed to the Seattle School Board in 1964 and had been rejected.) It was reworked in cooperation with School District planners and was offered to the public as "Plan V."

The School District held over 30 public meetings to explain the elements of the five proposals during the fall of 1977. Most of these meetings were attended by one or more Board members. As we had earlier agreed, each of us wrote his or her reaction to what occurred at the public hearings. We were extremely concerned that the Board be able to demonstrate we had heard public opinion and were responsive to it.

My observations of the meetings I attended, and the results of a questionnaire which was passed out at the meetings, were that the public's concerns were sometimes contradictory — there was a strong desire expressed for voluntary programs, freedom of choice and wide options, but these had to be weighed against contrasting desires for stability and continuity of assignment. Citizens frequently expressed a desire for the most economical method of desegregation, and yet we have seen voluntary programs are the most costly. There were also clear expressions in favor of keeping neighborhood children together regardless of their school assignment.

It was apparent there was no way we could design a plan which would address all of these conflicting goals. However, the community desires for stability, predictability, continuity, and neighborhood cohesiveness seemed of paramount long-term importance to me, in addition to our absolute criteria of equity of movement between majority and minority children and the maintenance of ethnic identity.

We also heard (very vociferously) from parents of students presently in the VRT and magnet programs. They expressed the view that they had shown an act of faith in transferring their children, and that the School District had an obligation to continue their programs. The Board

realized that allowing choices and grandfathering present transfers would complicate our transportation problems and add to our overall costs, but our Board was committed to options in education. We were also concerned about the good will of those parents who had supported our past voluntary desegregation efforts. They strongly advocated a plan which incorporated educational options.

At our November 9, 1977 meeting the Board spent a good deal of time discussing certain issues outlined by Dr. William Maynard. His analysis pointed out that the five models we had been discussing in public presentations could be divided into two basic strategies: (1) primary strategy voluntary movement, with a mandatory backup; or (2) primary strategy mandatory, but containing a voluntary component. The selection of one or the other of these basic strategies dictated what forms would follow.

I believe the entire Board felt a voluntary plan would be most desirable, but by that time the majority knew we could not reach our objective by exclusively voluntary means. Given this knowledge, we had to decide how we would choose those students who would be assigned away from their neighborhood schools in order to augment the students who had volunteered to be reassigned. The Board preferred a plan that moved groups of neighborhood students together, such as the pairing or triading of schools. This posed a dilemma: the number of volunteers and where they will go is completely unpredictable from year to year. Thus, a pairing or triading plan is unworkable as a back-up to a voluntary-first plan.

Perhaps a hypothetical example of this might be helpful in explaining this problem:

> School A is a minority-imbalanced school (75 percent minority). It has 400 students, 300 of whom are minority, and is 50 students over its proper building capacity of 350. It would require 158 white students and 192 minority students to reach a racial balance of 55 percent minority, which under the Board's definition was the point of racial imbalance last year. This means 108 minority students must leave. If, for example, 50 minority students voluntarily transfer to various optional programs, this still requires the dis-

placement of 58 individual minority children and their replacement by 58 majority children, to reach the Board's goal.

With this hypothetical example it can be seen that the Board's goal of eliminating racial imbalance cannot be met by "backup" pairings of predominantly minority schools with predominantly majority schools, because the District cannot know, until the voluntary recruitment phase is completed, which schools can logically be paired. It will be next to impossible to recruit student volunteers to a school if they do not know if it is going to be paired and its grade structure changed later in the year. Because the number of volunteers and their selected schools will change every year, the elements of stability and continuity will be lacking in this backup strategy. A voluntary first plan thus limits the backup strategy to some kind of random reassignment of individuals or clusters of students.

We also perceived educational and stabilization advantages to pairs/triads, particularly with the District's current problem of declining enrollment. By concentrating students of only two or three grades in one school and coupling school populations, we will be able to take better advantage of specialized teachers, and can also offer far more flexibility in class arrangements as well as options in teaching style. For instance, in an elementary school with 120 third graders, it will be possible to have one self-contained classroom of 30, one team-teaching arrangement of 60, and one alternative program serving all three grade levels (30 of them third-graders). There are also some positive facility aspects — pairing a typically crowded minority school with an underutilized white school equalizes the two populations and more effectively utilizes space.

I cannot speak for the other Board members, but I believe they were all going through similar mental struggles to find a plan which would be most acceptable to the community and which would best serve our children and the long-term interests of the City. I believe this is how general support for the pair/triad plan came about.

As we began to hammer out the final details of The Seattle Plan (at the end of November and in early

December, 1977), then Board president Don Olson made a strong statement to the effect that the issue of "voluntary first" or "mandatory first" had become moot. The Board was working toward a plan which gave every child a choice. Creating the pairs and triads accomplished our basic goal of desegregation, but students would be allowed and indeed encouraged to choose other programs within the District. Their transfers would be allowed if the transfer did not increase racial imbalance and if there was available space. (This year over 5,000 students have taken advantage of this opportunity.) The Board adopted the Seattle Plan on December 14, 1977 in Resolution 1977-28, a copy of which is Exhibit 12. After adoption of the Plan, the Board took several subsequent actions prior to the 1978-79 year. These actions are reflected in Exhibits 13 through 20, which are copies of administrative documents from February 1, 1978 to June 5, 1978 describing Board actions and administrative implementation thereof.

The Initiative 350 campaign

In addition to my official participation as a member of the Seattle School Board during development of the Seattle Plan and its subsequent defense in the Roe cases in King County Superior Court, I was extensively involved as a private citizen in political activities opposing Initiative 350. I was one of the original members of the State Committee for Local Control, organized to oppose Initiative 350. It was clear from my reading and from analysis by School District attorneys that the effect of implementing Initiative 350 would be to dismantle all aspects of the Seattle Plan and thus resegregate Seattle Schools.

I personally appeared on a number of platforms prior to the November 1978 election either as a panelist or debator with members of CiVIC (including Robert Dorse, Veda Jellen, Vicki Schmitz, Ben Caley). I have explained and defended the Seattle Plan in these public exchanges, and have debated the potential effects of Initiative 350. Representatives of CiVIC concentrated most of their attacks on desegregation in Seattle and criticism of the

Seattle Plan and minimized any state-wide effect. They spoke of their conviction that their lawsuits filed in Superior Court in December 1977 and January 1978 would be successful in stopping implementation of the Plan. After failure of those suits (Exhibits 21, 22, and 23 are copies of Judge Howard's three orders in the *Roe* cases dismissing the CiVIC plaintiffs' claims), they concentrated on their proposed Initiative and its effectiveness in preventing further "forced busing."

The words "busing," "forced busing," and "mandatory busing" have come to be synonymous with student reassignment for desegregation purposes. "Busing" has become sort of a code word, and is seldom if ever used for the multitude of student transportation purposes other than fixed assignments to reduce racial imbalance (*e.g.*, special education, over two-mile, extra curricular, hazardous, and voluntary desegregation), which other purposes ironically cover the larger portion of our transportation budget.

At a meeting April 18, 1977, at the Magnolia Community Club, Veda Jellen, CiVIC's legislative cochairperson, raised the issue of Tacoma's transportation costs compared to Seattle's as an example of how a so-called "voluntary" plan would be much less expensive than Seattle's mandatory. Yet, all of Seattle's transportation costs are greater than Tacoma's (special education, two-mile, etc.) because of different service levels, our peculiar geography and Tacoma's greater reliance on municipal bus service. It is not Tacoma's "voluntary" transportation which makes their costs less than Seattle's "mandatory" transportation. It is their reliance on municipal bus passes. Seattle's "mandatory transportation" costs less than its "voluntary transportation."

When Mr. Dorse appeared before the Board on December 12, 1977, he urged us to adopt an open enrollment plan to satisfy any legal obligation we might have to desegregate. He did not appear to be concerned with the effectiveness of such a plan for integration. He suggested at that meeting that the Board should canvass the parents of Seattle to ask "Where would you like your children to go

to school?" Answering his own question he said "I'll bet you would find darn few would want to shift around."

Representatives of CiVIC in early public presentations were extremely laudatory of the plan developed by Tacoma to desegregate its schools. I can recall specific occasions with Mr. Dorse and Mrs. Jellen when they proposed the Tacoma Plan as an alternative to our plan. They characterized it as voluntary in nature. I certainly anticipated elements of the Tacoma Plan would be present in the plan CiVIC ultimately developed. This was not the case. Tacoma's success was dependent upon school closures and "ethnic lidding" (limiting minority enrollment in their neighborhood schools). Thus, Tacoma's plan would not work in Seattle under the provisions of the CiVIC Initiative.

One aspect of the Seattle Plan which is particularly important to me and which is lacking in many desegregation plans is its racially neutral structure. Race is taken into account in determining total school population ratios, but because the whole neighborhoods move together, the race of an individual child is not significant in determining who will move.

While Initiative 350 makes no reference to reassignment for racial reasons, it is clear to me, after following the history of desegregation in Seattle and the genesis of CiVIC, that the motivating purpose behind the Initiative was to prevent implementation of the Seattle Plan, and to prevent any further efforts to desegregate Seattle schools through reassignment policies. For instance, a letter (Exhibit 24) to School Board Members, dated January 27, 1978 from Deiter Jahns, CiVIC member, lists many of the desegregation tools found in Section 3 of the Initiative.

During the election campaign which led to adoption of Initiative 350, there were questions raised as to the meaning of many aspects of the ballot issue. Proponents of the measure (CiVIC) took the most flexible position possible, contending, for instance, that grade reconfigurations were not prohibited so long as students were reassigned to the nearest or next nearest school after the grade

reconfiguration. The Attorney General's explanatory statement in the Voters' Pamphlet gave the same interpretation. Proponents stressed that the Initiative would not interfere with traditional school district assignment authority except for racial balance reasons. At a debate over Initiative 350 which I had in October 1978 with Ben Caley, CiVIC's legislative cochairperson, he said the Initiative would not affect "99 percent" of the State's school districts. When questions were raised by the Seattle School District or by opponents of the Initiative as to school district flexibility to deal with nonracial balance student assignments under the Initiative, CiVIC's responses and advertising were unvarying: No such restrictions of local control would occur under the Initiative. Responding to questions raised that disciplinary transfers might not be allowed, CiVIC contended that Initiative 350 did not prohibit such movement. Special programs could be moved under their interpretation. Special education students were excused from the "nearest" or "next nearest" school provisions in the language of the initiative, as were students whose routes involved safety hazards. Overcrowded buildings were exempt under CiVIC's definition. In short, it appeared to me, that the only educational reason students could not be assigned beyond nearest or next nearest was for purposes of racial balancing. Exhibits ___ and ___ are opinion letters from CiVIC attorney James Oliver which were circulated by CiVIC during the campaign. They were frequently available in stacks on tables at places I appeared to debate Initiative 350 with CiVIC members.

Exhibit 25 is a flyer prepared by the anti-Initiative 350 citizens' group and widely distributed in the campaign.

Although opponents of Initiative 350 attempted to focus attention on other issues, it was and remains my perception that opponents were never successful in shifting the issue away from "forced busing," *i.e.*, busing for desegregation.

On November 1, 1978 the Mayor of Seattle and heads of Seattle's Chamber of Commerce, Municipal League and

Urban League again wrote to the School Board. A copy of that letter is Exhibit 26.

In late October 1978 the Seattle School District sent to parents of all Seattle Public School students the flyer which is Exhibit 27.

School closures

The Initiative specifically allows for school closures, with the proviso that students thus displaced must be assigned to the "nearest" or "next nearest" school. I can personally attest to the political difficulties of closing any school in Seattle, but such closures, in my opinion, should reflect a number of considerations such as the quality of the buildings, their educational value, and their use by the community. If desegregation becomes the sole criteria, we would have to ignore other vital elements of so serious a decision.

Because our minority impacted schools are generally over-crowded, there is not room for additional white students in those schools without displacing minority students and we cannot displace minority students into surrounding schools without adversely affecting those schools' racial composition. Closure of minority schools results in the same problem. For example: If Leschi were to be closed, the nearest and next nearest schools are Madrona, Minor, Colman and Gatzert — all racially imbalanced and (with exception of Madrona) near or over capacity prior to implementation of the Seattle Plan.

Continuation of the Seattle Plan

The District has proceeded with planning for full implementation of the Seattle Plan. On October 25, 1978, after a three and one-half week delay in starting school due to a teachers' strike, the Board passed a motion directing preparation of a "year two" planning resolution. Exhibit 28 is pertinent pages of the official minutes of the October 25 meeting.

On November 15, 1978 the Board adopted Resolution 1978-23, which is Exhibit 29. The planning process followed subsequently is outlined in Exhibit 30, an adminis-

trative document dated November 28, 1978.

Exhibits 31 through 34 are administrative documents describing the process of citizen involvement and Board action on 1979-80 desegregation plans; Exhibit 34 contains the motion adopted by the Board March 7, 1979 outlining most of the 1979-80 program. In mid-April, the Board also voted to distribute Colman School's students to surrounding schools and to use the Colman facility for other District programs.

Exhibit 35 is a report prepared by District staff on several aspects of the Seattle Plan's effects this school year. It was given to the Board on April 20, 1979.

DATE: April 23, 1979.

/s/_____
Cheryl Bleakney

EXHIBIT 10

RESOLUTION NO. 1977-9
PLANNING FOR THE ELIMINATION OF RACIAL IMBALANCE

WHEREAS, The Board of Directors of Seattle School District No. 1 has, in Resolution 1977-8, resolved to eliminate racial imbalance in Seattle Public Schools by the beginning of the 1979-80 school year; and

WHEREAS, the Board of Directors is committed to achieving this goal by educationally sound strategies; and

WHEREAS, the Board of Directors recognizes that the development and implementation of methods that are in the best interests of children within the District require thorough and adequate planning; and

WHEREAS, the Board of Directors believes that the development of sound and responsible plans will increase community support for the District's efforts; now, therefore,

BE IT RESOLVED THAT:

1. The Seattle School District administration is directed to develop educationally sound plans to be used to eliminate racial imbalance in Seattle Public Schools by the beginning of the 1979-80 school year. The Magnet School Program, the Voluntary Racial Transfer Program, as well as other District-developed desegregation programs, will continue as major components of these strategies. Additional strategies, e.g., facility closures, boundary realignments, and pairing, clustering, or zoning, are to be used as necessary to achieve this goal upon Board approval.

2. A structure and timetable for developing these plans be brought to the Board for its adoption during July, 1977.

3. This structure and timetable should at least include the following considerations: an estimate of the personnel and financial resources needed to plan educationally sound strategies; the possibility of interagency cooperation in planning, either through direct involvement or as expert resources; citizen and community involvement in the planning process; and a continuing public information process.

4. In developing the strategies to be used to eliminate racial imbalance, the mandatory strategy of random reassignment by computer is not to be used in isolation from educationally sound strategies. All other strategies are appropriate for consideration.

5. The plans to eliminate racial imbalance be comprehensive and system-wide, and include a recommendation regarding integrating the current middle school desegregation program into them.

6. The plans indicate the extent to which racial imbalance will be eliminated by the various strategies and, if necessary, which and when supplemental actions will be used to achieve these goals.

7. The plans reflect the unique aspects of the Seattle School District including the multiracial and multicultural composition of schools.

8. The plans developed be presented to the Board no later than October 1, 1977, so that there may be public hearings prior to final Board action.

9. The Board be provided a progress report on planning activities at least on a monthly basis which is to include identification of potential problem areas.

10. By December 15, 1977, the Board will select the comprehensive plan contining specific strategies and implementation timetable to be used to eliminate racial imbalance by the beginning of the 1979-80 school year.

Adopted this 8th day of June, 1977.

/s/_____
Don Olson, President

/s/_____
Suzanne Hittman, Member

/s/_____
Patt Sutton, Vice President

/s/_____
Dorothy Hollingsworth, Member

/s/_____
Richard Alexander, Member

/s/_____
Ellen Roe, Member

/s/_____
Cheryl Bleakney, Member

ATTEST:_____
David L. Moberly, Secretary
Board of Directors
Seattle School District No. 1
King County, Washington

EXHIBIT 11

OFFICE OF THE MAYOR
CITY OF SEATTLE

Wes Uhlman, Mayor

May 20, 1977

Mr. Don Olson, President
Seattle School Board
Administrative and Service Center
815 Fourth Avenue North
Seattle, Washington 98109

Dear President Olson:

The signators of this letter are sympathetic to the difficulties the Seattle School District must face in developing, adopting and implementing a successful desegregation plan. We wish to commend the School Board and Administration for the exhaustive amount of time and work already devoted to this issue, and to thank you for approaching your task with sensitivity and concern.

Experience elsewhere indicates that a commitment on the part of local leadership has contributed immeasurably to successful desegregation of the public schools. As civic leaders, we have expressed support for desegregation to you individually in the past and will continue to do so in the future. Now, however, the City of Seattle, the Seattle Chamber of Commerce, the Municipal League of Seattle and King County, and the Seattle Urban League wish to go on record together and as one voice to declare united support for your adoption of a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools, prior to a Court ordered and mandated desegregation remedy.

Our position is based on consideration of the following points: First, we believe quality integrated education

should be provided for the children of this City. We believe that an integrated education offers children a chance to share self-knowledge and learning experiences so that they can comfortably and comparably adjust to the pluralistic society of which Seattle is justifiably proud. Second, we believe your adoption of a definition of racial isolation and measurable goals at this time will provide the public with a clear understanding that desegregation will inevitably occur. We know community cooperation, critical to desegregating the schools smoothly without unnecessary disruption, will depend on how well the public is informed. Third, we do not believe that action to desegregate the schools based on goals for elimination of racial isolation must necessarily require extensive random relocation of students. We see these goals as accommodating ranges of possible strategies and programs related to the special character of the different communities in this city. Finally, we are unaware of any conclusive evidence that suggests Seattle will experience significant middle-class outmigration as a consequence of school desegregation, as long as certain conditions are met. Outstanding in importance among these conditions are (1) a measurable commitment on your part; (2) open and appropriate involvement of citizens and citizen groups from the point of policy and plan development through implementation; and (3) the support of others besides yourself who occupy positions of civic responsibility and leadership.

We appreciate this opportunity to tell you that we are ready to stand behind you as you move forward with programs for providing quality integrated education which will further the interests of the people of Seattle.

Sincerely,

/s/_____
Wes Uhlman, Mayor
City of Seattle

/s/_____
Mike Berry, President
Seattle Chamber of Commerce

/s/_____
Shan Mullin, President
Municipal League of Seattle
and King County

/s/_____
Mark Cooper, President
Seattle Urban League

WU:sim

cc: Mr. Richard Alexander
Mrs. Cheryl Bleakney
Mrs. Suzanne Hittman
Mrs. Dorothy Hollingsworth
Mrs. Ellen Roe
Mrs. Patt Sutton
Honorable Members, Seattle City Council
Dr. David Moberly, Superintendent

EXHIBIT 12

RESOLUTION NO. 1977-28

ADOPTION OF COMPREHENSIVE PLAN INCLUDING SPECIFIC STRATEGIES FOR ELIMINATION OF RACIAL IMBALANCE

WHEREAS, the Board of Directors of Seattle School District No. 1 has determined that the best interests of the students of Seattle School District No. 1 will be served by providing all students with the opportunity for a quality education in a multiracial setting; and

WHEREAS, the Board of Directors has further determined that it is in the best educational interests of the students of the District to eliminate racial imbalance (as defined in Resolution 1977-8) in District schools so as to better prepare students to live in a pluralistic society; and

WHEREAS, the Board of Directors specified in Resolution 1977-9 that it would select a comprehensive plan containing specific strategies and implementation timetable to be used to eliminate racial imbalance by the beginning of the 1979-80 school year; and

WHEREAS, extensive citizen and community involvement in the District's planning process since the passage of Resolutions 1977-8 and 1977-9 has been instrumental in development of strategies for elimination of racial imbalance; and

WHEREAS, it is the determination of the Board of Directors that equitable, certain, and educationally-sound elimination of racial imbalance may best be accomplished through a combination of educational options for students and parents and redesigned attendance areas; and

WHEREAS, the Board of Directors has as its goal the desegregation and integration of the Seattle School District through the implementation of comprehensive plans including encouraging integrated neighborhoods in District planning activities, facilities and program decisions; and

WHEREAS, the Board of Directors of Seattle School District No. 1 desires that the desegregation plan be developed by and for the citizens of Seattle and not in a federal court or agency of the federal government; now, therefore,

BE IT RESOLVED THAT:

1. Beginning in school year 1978-79, the Seattle School District will be comprised of three zones. Zone I will be the Franklin, Ingraham and Ballard geographic attendance areas. Zone II will be the Hale, Roosevelt, Lincoln and Garfield geographic attendance areas. Zone III will be the West Seattle, Cleveland, Rainier Beach and Chief Sealth geographic attendance areas. The Queen Anne attendance area will serve as a transition area between Zones I and III.

2. In each Zone, certain elementary schools will be linked in groups of two (pairs) or three (triads), which groups will have combined majority and minority student populations in proportions not racially imbalanced. Most elementary schools which are currently racially imbalanced will be included within pairs or triads. The elementary schools among which pairs and triads for 1978-79 will be selected are:

ZONE I	ZONE II	ZONE III
Briarcliff	Bryant	Arbor Heights
Brighton	Colman	Beacon Hill

Broadview	Day	Dearborn Park
Columbia	Decatur	Dunlap
Graham Hill	Gatzert	Fairmount Park
Hawthorne	Green Lake	Fauntleroy
Hay	King	Genesee Hill
Muir	Leschi	Highland Park
North Beach	Lowell	High Point
Northgate	McDonald	Hughes
Oak Lake	McGilvra	Lafayette
W. Queen Anne	Minor	Magnolia
W. Woodland	Montlake	Maple
Whittier	Ravenna	Rainier View
Whitworth	Seward	Roxhill
	Stevens	Schmitz Park
	University Hts.	Van Asselt
	View Ridge	Wing Luke
	Wedgwood	

In addition, other schools will be added to the above list as necessary.

3. By no later than the beginning of the 1979-80 school year other elementary schools which are close to being racially balanced will undergo boundary changes, be converted to racially balanced magnet schools, or experience sufficient voluntary student movement to assure that they are not racially imbalanced.

4. Elementary schools will feed junior high and middle schools within their Zones, and junior high and middle schools will feed high schools within their Zones, according to patterns which will eliminate racial imbalance in the secondary schools as students progress in grade level. For 1978-79, only students changing from elementary schools to junior high or middle schools, or changing from junior high or middle schools to high schools, will follow newly-established feeder patterns.

5. An integral feature of the overall program for elimination of racial imbalance will be the availability of program options for students affected by these strategies, provided that selection of options does not contribute to racial imbalance. Program options within schools, magnet programs within pairs/triads, all-zone

magnets, all-city magnets, alternative schools, and special programs will be among the alternatives available to students affected by these strategies. To the extent possible the same options will be available to students not affected by these strategies.

6. For the 1978-79 school year, kindergarten students will not be required to participate in the attendance redesignation plan.

7. The Board and Administration will continue to seek the involvement and counsel of parents, staff, students, and interested citizens.

Adopted this 14th day of December, 1977.

/s/_____
Don Olson, President

/s/_____
Suzanne Hittman, Member

/s/_____
Patt Sutton, Vice President

/s/_____
Dorothy Hollingsworth, Member

/s/_____
Richard Alexander, Member

/s/_____
Ellen Roe, Member

/s/_____
Cheryl Bleakney, Member

ATTEST:_____
David L. Moberly, Secretary
Board of Directors
Seattle School District No. 1
King County, Washington

EXHIBIT 36

PREFILED WITNESS STATEMENT OF DR. GARY ORFIELD

I am an associate professor of political science at the University of Illinois, and have held that position since September of 1976. I have researched and published extensively in the field of public school desegregation. Attached hereto as Exhibit A is a true copy of my current professional vita, which accurately summarizes my academic training, professional experience and

publications. The citations in this statement and citations to be found in my various publications listed in my vita indicate the type of facts or data upon which I rely in making the conclusions set forth in this statement. These facts and data are of the type reasonably relied upon by experts and social scientists in the field of public school desegregation in forming their opinions.

My most comprehensive work on desegregation is *Must We Bus? Segregated Schools and National Policy* (Washington: Brookings Institution, 1978, 470 pp.) (Exhibit 37), which examines the factors which have produced segregated public schools, and the prospects for improvement of the school segregation situation nationally in light of segregated residential housing, and concludes that assignment and transfer of students away from neighborhood schools is realistically the only way the public schools in American urban centers can be desegregated in this century.

Residential segregation in most major American cities, as in Seattle, is very high, and on a metropolitan level may well be increasing, so that adherence to a neighborhood school assignment policy has the predictable effect of school segregation.[1]

Typical processes of ghetto expansion are still very important. In many American cities during the last 30 to 60 years, residential areas of predominant minority occupancy have greatly expanded. Often an increasing black or Hispanic population has moved into housing formerly occupied by (Anglo) whites. This process of "racial succession" or "ghettoization" has been perceived as a relentless "natural" force, yet it is in fact governed by institutional policies and practices as well as private prejudice and is not at all inevitable. The process is a textbook example of

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[1]Frank deLeeuw, Anne B. Schnare, and Raymond J. Struyk, "Housing," in William Gorham and Nathan Glaser eds., *The Urban Predicament* (Washington: Urban Institute, 1976), pp. 145-55. The increase in metroplitan residential segregation during the 1960's is documented in van Valley, Roof and Wilcox, "Trends in Residential Segregation: 1960-1970," *American Journal of Sociology* Vol. 82 (Jan. 1977), pp. 826-844.

a self-fulfilling prophecy. The expectation by whites that an area will become black leads them to take individual and collective actions that ensure the outcome. Housing market barriers against sale or rental to blacks are reduced, panic selling tactics often stimulate white residents to leave, and potential white immigrants from other parts of the city are steered away from the neighborhood because it is "turning" or "going."

Change in the racial identifiability of a school can influence the pace of change in racial composition in a "changing" residential area.[2] In contrast, a school with a stable racial mix connotes to nearby residents and potential in-movers that they will not be forsaken by school authorities. School policies can serve to "coalesce a neighborhood and generate confidence in its continued stability."[3].

Housing patterns cannot be explained simply by income level of minority and majority families. For instance, the average white family in the United States with an income below the official poverty line lives in a neighborhood with a higher average income than the neighborhood where the average black family with a $25,000 a year income lives.[4] If institutional and societal pressures did not operate to discourage blacks and other minorities from seeking housing commensurate with their ability to pay, black families would appear more proportionately in neighborhoods containing housing stock commensurate with their ability to pay. Most blacks would live in the suburbs if they were distributed the same way as whites with similar incomes. Reliable studies with which I am familiar show that blacks prefer to live in integrated

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[2]Wolf, "The Tipping Point in Racially Changing Neighborhoods," *Journal of American Institute of Planners*, v. 29 (1963), 217-222, esp. 220-1; white enrollment decline in a single school declines faster as the percent black population rises. (Michael Giles, "White Enrollment Stability and School Desegregation: A Two-Level Analysis," *American Sociological Review* Vol. 43, 1978.)

[3]Vandell and Harrison, *Racial Transition in Neighborhoods* (Cambridge: Joint Center for Urban Studies, 1976), 13.

areas by very large margins. A new study of metropolitan Detroit, for example, shows that black desire for integrated housing is even higher than the civil rights movement of the 1960's. (Reynolds Farley and associates, "Chocolate City, Vanilla Suburbs: Will the Trends Toward Racially Separate Communities Continue?" — *Social Science Research*, Vol. 7 (Dec. 1978), pp. 319-344).

In 1917 the Supreme Court prohibited local zoning ordinances which established separate areas for blacks and whites.[5] However, even in areas where that ruling was respected, enforcement of housing segregation was still successfully accomplished through racially restrictive deed covenants. Such covenants were allowed until the decision in *Shelley v. Kraemer*, 344 U.S. 1 (1948), held that judicial enforcement of racially restrictive covenants was unconstitutional state action.

Official policies and practices of Federal housing agencies which were dominant forces both in the subsidized housing market and much of the private market were openly segregationist until 1948. After that period, by admission of ranking federal housing officials, no significant initiative segregation was taken until the 1967-68 period. Research on the impact of the dominant housing subsidy programs of the late 1960's and early 1970's strongly suggests that they had the consequence of subsidizing the flight of low income whites from integrated areas and subsidizing the location of minority families in segregated or transitional areas. A recent HUD study of the private housing market revealed strong continuing discriminatory policies. HUD Secretary Patricia Harris has recently testified before Congress that federal fair housing law has failed.[6]

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[4]Brigitte Mach Erbe, "Race and Socioeconimic Segregation," *American Sociological Review*, vol. 40 (December 1975), pp. 804, 809.

[5]*Buchanan v. Warley*, 245 U.S. 60 (1917).

[6]Federal Housing Administration, Annual Report (GPO, 1935), p. vi.; Rose Helper, *Racial Policies and Practices of Real Estate Brokers* (University of Minnesota Press, 1969), p. 202; and Richard Resh, *Black America* (D.C. Heath, 1969), pp. 104-05; Martin Meyerson and Edward

The major housing subsidy programs of the late 1960's and 1970's (Section 235, Section 236 and Section 8) have produced substantial numbers of housing units in white areas but have marketed these units very largely to low income whites while subsidizing blacks in ghetto and transitional areas.

Continued segregation during the recent rise nationwide in housing prices has now effectively shut off minorities from home ownership in many areas.[7] Thus, the combination of past segregative actions and recent and present price increases has, as a practical matter, worked to insure that minorities will not be substantially involved in the process of "naturally" integrating neighborhoods in the near future.

Current studies indicate that only enthusiastic government intervention can now desegregate housing.[8] Sanctions and positive incentives are needed to accomplish this goal. In this climate, it is clear that "natural" integration of the schools is too slow, unless the Nation is willing to accept at least generations more of segregated public schooling.

C. Banfiled, *Politics, Planning, and the Public Interest: The Case of Public Housing in Chicago* (Free Press, 1955), p. 121; Commission on Race and Housing, "Where Shall We Live?" in William L. C. Wheaton, Grace Milgram and Margy Ellin Meyerson, eds., *Urban Housing* (Free Press 1966), p. 281; National Committee Against Discrimination in Housing, *How the Federal Government Builds Ghettos* (NCDH, 1967); speech by Philip Maloney, FHA Deputy Commissioner, reprinted in *Congressional Record* (December 5, 1967), p. 35023. Commission on Civil Rights, *Home Ownership for Lower Income Families: A Report on the Racial and Ethnic Impact of the Section 235 Program* (CPO, 1971) unpublished tabulations of Section 8 location statistics by Richard Fleisher, University of Illinois; Testimony of James T. Lynn, secretary of HUD, in *Oversight on Housing and Urban Development Programs, Washington, D.C.*, Hearings before the Senate Committee on Banking, Housing, and Urban Affairs, 93:1 (GPO, 1973), pt. 1, pp. 243-94.

[7]Gary Orfield, *Must We Bus?* (The Brookings Instituion 1978), p. 89.

[8]Anthony Downs, *Opening Up the Suburbs: An Urban Strategy for America* (Yale University Press, 1973); Commission on Civil Rights, *Equal Opportunity in Suburbia* (GPO, 1974).

Reynolds Farley, a leading racial demographer, concluded in a 1975 study that given present trends, schools organized on a neighborhood basis would remain segregated indefinitely in this country.[9] The same study showed that blacks are not represented in their income level in neighborhoods at anywhere close to the levels of their ability to pay would suggest.

School integration may indeed be a prerequisite for stable housing integration. For instance, two cities which successfully desegregated their schools in the 1960's, Berkeley and Sacramento, had among the highest levels of housing integration in American cities (fifth and third, respectively) in the 1970 census. Evanston, Illinois, which had an early desegregation program, reduced its level of housing segregation in spite of the increases in housing costs. Thus, it is apparent that district-wide school desegregation contributes to residential integration.[10] In Riverside, California some families moved to be near a school to which their children were being bused. Thus, school desegregation gave impetus to residential integration.[11] In Louisville, Kentucky the exemption of integrated neighorhoods from the busing program there has reportedly stabilized the racial composition of the exempted neighborhoods.[12] It appears that one key to stabilizing neighborhoods and preventing them from

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[9]Reynolds Farley, "Residential Segregation and Its Implications for School Integration," *Law and Contemporary Problems*, vol. 39 (Winter 1975), p. 167.

[10]Orfield, *supra*, p. 97. Sorensen, Taeuber, and Hollingsworth, "Indexes of Racial Residential Segregation," pp. 7-9.

[11]Christine Rossell, "The Social Impact of School Desegregation," Research Proposal to National Institute of Education (1974); processed), p. 11.

[12]Kentucky Commission on Human Rights, "Fair Housing—A Better Answer than Busing" (September 22, 1975; processed). The number of blacks living in the suburbs increased 63 percent between 1973 and 1977; residential segregation diminished in exempt neighborhoods. *Integrated Education* (September-October 1977), p. 33. [Unfortunately, although all will agree that fair housing is preferable to busing, enforcement of fair housing laws has been extremely weak according to a 1978 report to HUD.]

"tipping" from integrated to minority imbalanced is to retard the transition process by guaranteeing that the schools will remain integrated.[13]

If, as can easily be established, the values of the neighborhood school and public school desegregation are mutually exclusive, the real issue which must be faced is: Which should have priority? Are "neighborhood schools" of greater importance, even if they guarantee perpetuation of public school segregation? Or is desegregation more important than neighborhood schools, even if requires busing?

As it is my understanding that the educational soundness of public school desegregation is not in question in this case. I do not at this time offer any observations on that subject.

The Ineffectiveness of Voluntary Approaches to School Desegregation

"Freedom of choice" or "voluntary" desegregation plans such as Initiative 350 would direct, are ineffective to accomplish the elimination of racial imbalance in big city schools. Only one urban school district in the U.S. has achieved a large degree of success in desegregation through "voluntary" approaches. In Milwaukee many schools have come within judicial guidelines through voluntary transfers. These transfers were not, however, strictly voluntary. The school district was under strong pressure since the court order said that there would be mandatory reassignments if the plan failed, and indeed, a substantial amount of the student movement — especially minority movement — is "mandatory." Without such an order, and very strong pressure on administrators to produce transfers throughout the system, the progress achieved

[13]In two recent lower court decisions as to which the Supreme Court has denied review, past discriminatory housing practices by governmental entities have been held to be among the grounds for *interdistrict* school desegregation orders. *U.S. Board of Commissioners of the City of Indianapolis, Indiana*, 541 F.2d 1211 (7th Cir. 1976); *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975) (Wilmington, Delaware).

would not have occurred. Moreover, the system still leaves substantial numbers of black children in highly segregated black schools that have been drained of their most highly motivated students and their families. My latest information is that the parties in Milwaukee have reached a settlement under which mandatory movement will comprise a substantial portion of desegregation movement. This settlement has yet to be approved by the Court.

In most cities voluntary plans have been dismal failures. Chicago's $35 million effort this year brought transfer of less than one percent of the students. Philadelphia's magnet plan produced some magnet schools more segregated than they were before they were "magnetized." Plans have failed to achieve substantial integration in Houston, San Diego, St. Louis, and a number of other cities. Especially given the previous failure of the magnet plan in Seattle to reduce the number of segregated schools, it is extremely unlikely that a voluntary-only approach would now work. To the extent that it did work it would produce almost totally one-way desegregation, since efforts to draw whites voluntarily into big city minority area schools have failed badly. * * *

EXHIBIT 37

EXCERPTS FROM BOOK "MUST WE BUS" BY DR. GARY ORFIELD

* * *

Does School Desegregation Cause Residential Resegregation?

During 1975 debate among both scholars and policymakers was stimulated by a brief paper by James Coleman in which he stated that increases in school desegregation under some circumstances produced an accelerated departure of white families from the cities.[76] Antibusing leaders used this research to argue that busing students

was not only unpopular but senseless, producing a result exactly opposite from its intent.

But Coleman's actual assertions were far more limited than the antibusing argument implied. Declines in white enrollment, Coleman reported, were rapid in central cities with sizable black populations *whether or not* schools were integrated Desegregation, he suggested, may intensify the problem temporarily in the largest cities. (Very few big cities had carried out any kind of citywide desegregation plan by this time.) This does not mean, of course, that people were fleeing solely because of the race issue. A city with a high proportion of minority residents usually has a number of other problems — housing decay, outward migration of jobs, rising crime rates, increases in the costs of public services and tax levels. All of these may influence the decision of a family looking for housing or of a realtor recommending locations to a newcomer to the area. In larger urban areas the problems are often compounded when the number of private homes in the central city steadily declines and virtually all new construction is in the outer suburbs.

The waning attractiveness of central cities is mirrored in the attitudes of the people still living in them. Surveys by leading polling organizations — Gallup, Harris, Roper, and Opinion Research Corporation — have shown that the percentage of city residents who would stay if they had a choice has shrunk — from 22 percent in 1966 to 13 percent in 1972 — in part, perhaps, because of the riots of the late 1960s.[77]

After two years of heated dispute over Coleman's argument it was still not clear whether desegregation plans increased the rate of white departure. One 1977 study, for example, argued that public reaction to underlying demographic changes in the city and to deteriorating city conditions would explain the statistical trends of white enrollment without any reference to desegregation plans at

[77]See summary of poll data in James L. Sundquist, *Dispersing Population: What America Can Learn from Europe* (Brookings Institution, 1975), pp. 24-29.

all.[78] Most scholars believed, however, that there was a significant one-year accleration of white flight in big cities where a plan limited to the city only was implemented. Perhaps the enrollment decline in a single year would be that normally expected in two years.

Desegregation, in any case, neither creates flight where there was none nor has a long-term impact on the rate of declining white enrollment. Large central cities are losing their remaining white students rapidly even in neighborhoods with all-white schools. Often the decline is sharpest in aging, well-to-do white communities some distance from minority areas. To understand, one needs only to look at the age level of the female population remaining in the city. In 1970 the median age for white females still in Washington, D.C., was forty-six, in Chicago thirty-seven, in St. Louis forty-four, in Detroit forty, in San Francisco forty-one. On the average, black women in these cities were seventeen years younger. Black families were often in the middle of their child-bearing years. Young white families were in the suburbs. The imbalance in school enrollments could only increase.[79]

Coleman's study, as well as an intensive study of Florida school districts based on interviews with thousands of parents, suggests that where the desegregation plans include the suburbs residential stability is greater. Coleman and Farley report that the problem becomes most difficult when the central cities have large minority populations and the suburbs are virtually all white. There is considerable stability, on the other hand, in metropolitan school districts where there is no

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[78]Michael R. Fitzgerald and David R. Morgan, "Assessing the Consequences of Public Policy: School Desegregation and White Flight in America," paper presented at the annual meeting of the Midwest Political Science Association, April 22, 1977 (processed).

[79]David Sly and Louis Pol, "White Flight, School Segregation and Demographic Change," in Meyer Weinberg and others, *Three Myths: An Exposure of Popular Misconceptions about School Desegregation* (Atlanta: Southern Regional Council, 1976), pp. 62-63.

place to flee to.[80]

Desegregation of entire metropolitan areas maximizes stability. In other words, the smallest desegregation plans may have the worst effects on housing integration and the largest may create the most favorable conditions. The smallest create easily accessible haves of segregation; the largest equalize the burden, raise the cost of flight, and diminish the differeneces between city and suburban schools. Policymakers and judges who attempt to minimize flight by limiting the area of desegregation may be following exactly the wrong strategy.

* * *

Public Beliefs

In his classic 1944 study, *An American Dilemma*, Gunnar Myrdal probed the contradictions between American ideals of racial equality and American practices of segregation.[22] Each step toward desegregation since then has required recognition of these contradictions. Eventually, for example, it became clear that the only way to achieve desegregation in the South was to alter the tradition of local control in major ways. Contradictory beliefs about local control and equal rights were held for as long as possible. Only at a time of crisis — blatant actions by Alabama and Mississippi officials in 1963-65 — was the

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[80]Coleman found that flight was greatest "where there was a high degree of between-district segregation in the metropolitan area (thus providing a supply of predominantly white suburban schools to which families could move)," and "in districts with higher proportions of Black children." He explains the stable enrollment of a district like Hillsborough, Florida (metroplitan Tampa), by pointing out the absence of white suburban sanctuaries and the relatively small proportion of black students in the district as a whole. James S. Coleman, "Liberty and Equality in School Desegregation," *Social Policy*, vol. 6 (January-February 1976), pp. 10-12. Reynolds Farley, "Can Governmental Policies Integrate Public Schools?" (University of Michigan, Population Studies Center, 1976; processed).

[22]Gunnar Myrdal with Richard Sterner and Arnold Rose, *An American Dilemma: The Negro Problem and Modern Democracy* (Harper and Row, 1944).

contradiction resolved in favor of decisive national action. But there has been neither a major social movement nor political leadership to effectively point out that a dilemma still exists. People continue to support school desegregation and to oppose busing, refusing to recognize the incompatibility of their values and believing that there is some other way to achieve integration.

Growing Support for Integration

Increasing support for integrated schools has been a clear pattern in successive studies of public opinion over the decades. Three decades of surveys by the National Opinion Research Center showed remarkable growth of a consensus supporting integrated schools between 1942 and 1970. In 1942 only two northern whites in five supported integrated schools. Support had risen to three in five by 1956 and to more than four in five by 1970. The changes were notable in the South. In 1942 supporters of integrated education were a tiny minority, only 2 percent, of white southerners. Two years after the 1954 Supreme Court decision in *Brown*, the level had risen to 14 percent. By 1970 almost half of southern whites favored integrated schools.[23] A social movement — civil rights — had brought congressional action and administrative enforcement. After desegregation was imposed, the inconceivable became the new status quo.

Table 4-1. *Percentage of White Parents Objecting to Integrated Education, by Proportion of Black Students, Selected Years, 1959-75*

School level of black enrollment	*1959*	*1963*	*1965*	*1966*	*1969*	*1970*	*1973*	*1975*
South								
Few	72	61	37	24	21	16	16	15
Half	83	78	68	49	46	43	36	38
Majority	86	86	78	62	64	69	69	61

[23]Andrew M. Greeley and Paul B. Sheatsley, "Attitudes Toward Racial Integration," *Scientific American* (December 1971), pp. 13-14.

North								
Few	7	10	7	6	7	6	6	3
Half	34	33	28	32	28	24	23	24
Majority	58	53	52	60	54	51	63	47

Sources: *Gallup Opinion Index* (February 1976), p. 9; George H. Gallup, *The Gallup Poll: Public Opinion 1935-1971* (Random House, 1972), vol. 3; *1959-1971*, pp. 1598, 1940-41, 2010, 2211.

Answers to a related series of questions asked by successive Gallup polls in eight different years from 1959 to 1975 showed dwindling public opposition to integrated schools during the period, especially in the South during the 1960s, the region and period in which massive desegregation was concentrated (see table 4-1). Southern attitudes steadily moderated as integration proceeded. Between 1959 and 1975 the percentage of southern whites willing to send their children to school with a few black children grew from 28 to 85, while the number expressing "no objection" to their children's enrollment in half-black classrooms grew from 17 to 62 percent. At least nine-tenths of northerners were willing to accept some blacks in their schools throughout this period, and the number claiming that they had "no objection" to half-black schools grew from 66 percent to 76 percent.

Declining Support for Civil Rights Enforcement

Even as acceptance of integration was growing, public support for further action against racial discrimination virtually disappeared. The issue had dominated American politics at the time of the Birmingham crisis in 1963, during the subsequent congressional battle over President Kennedy's civil rights bill, and during the Selma march and voting rights struggle of 1965. Polls at that time showed that people saw action against discrimination as the most important question before the country. This public concern supported congressional passage of the two most important civil rights laws since Reconstruction, but it soon waned. Between March 1965 and May 1966, the percentage of people convinced that civil rights was the nation's most important problem plummeted from 52 to

9.[24] Though these levels fluctuated considerably, there was little support for accelerating integration. The social issues of crime and violence became dominant, urban riots across the country increased racial tension, and the polls showed growing resistance to further racial change. One scholar concludes that the opposition of national leaders (including the President after 1968) to desegregation enforcement may well have accelerated the trend. By the end of the 1960s, public opinion approximated "a state of moderate consensus *against* these civil rights initiatives."[25]

During the early 1970s, the public seemed less and less concerned. A national study of the hopes and fears of Americans in 1971 found that only one person in ten rated "settlement of racial problems" as a hope for the nation, down substantially from earlier measures in 1959 and 1964.[26]

The "problems of black Americans" again received low priority in a 1972 public ranking of national matters of concern. On a list of twenty-seven issues, they ranked twenty-fourth.[27]

A similar careful study of public attitudes, two years later in April 1974, found that the "problems of black Americans" ranked lowest among thirty issues studied. The most important issues were inflation, violence, and crime.[28]

Perhaps people paid little attention to civil rights because they believed that progress was occurring spontane-

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[24]George H. Gallup, *The Gallup Poll: Public Opinion 1935-1971* (Random House, 1972), vol. 3: *1959-1971*, pp. 1934, 2009.

[25]J. Michael Ross, "Resistance to Racial Change in the Urban North" (Ph.D. dissertation, Harvard University, 1973), p. 123, chap. 3, and p. 253.

[26]Albert H. Cantril and Charles W. Roll, Jr., *Hopes and Fears of the American People* (Universe Books, 1971), p. 23.

[27]William Watts and Lloyd A. Free, eds., *State of the Nation* (Universe Books, 1973), p. 35.

[28]William Watts and Lloyd A. Free, *State of the Nation 1974* (Potomac Associates, 1974), pp. 20-21.

ously. Almost one-fifth thought there had been substantial recent progress and another half believed there had been some. Only one in nine thought that blacks were losing ground. In fact, the American public expressed more optimism about progress on race relations than on any other domestic problem studied.[29]

These feelings were evident in public responses to Harris Survey questions asked in 1976 and 1977. During 1976 pollsters found that a 75-7 percent majority of whites believed that blacks were not discriminated against in public education. After more than two-thirds of the American public watched the 1977 eight-day television series *Roots*, which portrayed the history of slavery and discrimination, the Harris Survey asked white viewers the same question. White attitudes were held so strongly that this unprecedented experience had had little effect: 73 percent of the white viewers said there was no school discrimination and only 18 percent took the opposite position.[30]

Even at the height of the civil rights movement, when there were large majorities for action against segregation in public accommodations and other distinctively southern problems, the public was lukewarm on the issue of federal action to assure integrated schools. Polls conducted between 1964 and 1970, as well as a follow-up survey in 1974, showed that white support for such action never came close to 50 percent, and the unpublished 1974 data reportedly showed less white support than any of the previous polls.[31] Equally interesting in the survey ws the

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[29]Ibid., pp. 278, 305. Earlier reseach showed that most white Americans believed the problems of blacks were the result not of discrimination but of some failing of the blacks themselves. The reason most commonly cited with lack of motivation. Howard Schuman, "Free Will and Determinism in Public Beliefs about Race," in Norman R. Yetman and C. Hoy Steele, eds., *Majority and Minority: The Dynamics of Racial and Ethnic Relations* (Allyn and Bacon, 1971), p. 390.

[30]Harris Survey, published in *Chicago Tribune*, April 11, 1977.

[31]Institute for Social Research Survey reported in *New York Times*, August 18, 1975.

strong and consistent black support for federal enforcement of school desegregation even after the rise of the black power and community control movements.[32]

	Percent favoring federal action	
	Black	*White*
1964	68	38
1968	84	33
1970	84	41

The confidence of blacks in the federal government, however, had sharply declined. A 1972 Harris Survey found that most of them believed the Justice Department had become antiblack. While 72 percent said they had "depended on the Federal government a great deal for black progress" under Presidents Kennedy and Johnson, only 3 percent expressed similar faith about the commitment of the Nixon administration.[33]

Skepticism

When the busing issue arose in the 1970s, then, the public was not only uninterested in further desegregation but almost skeptical about the national government and the nation's schools. Most respondents to a question in a 1974 survey, for example, said that the "people in power" no longer cared about ordinary people, a severe erosion of confidence since 1966, when the same question was asked. More than two-thirds of the public believed that the government had "consistently lied to the American people over the last ten years."[34]

Nor was there much public confidence in the school system. A Gallup poll conducted in late 1973 showed, for instance, that the general level of dissatisfaction with

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[32]Angus Campbell, *White Attitudes Toward Black People* (Institute for Social Research, 1971), pp. 130-31.

[33]Louis Harris, *The Anguish of Change* (Norton, 1973), pp. 231, 232, 240.

[34]Patrick Cadell survey, reported in *New York Times*, April 15, 1974.

schools had risen from a low of 18 percent to 29 percent in just seven years. It was highest in the largest cities, reaching 40 percent in cities of over a million people and 34 percent in those of half a million to a million.[35] Although a 1966 Harris Survey found that 61 percent of the people had "a great deal of confidence" in education, in 1972 only 31 percent held similarly positive views. Much of the southern desegregation had taken place in an atmosphere of public support for education and rapidly growing national aid. Both were diminishing when the issue came up in the big cities of the North and West.

Things were even worse by the mid-1970s. Only one-eighth of the respondents rated the schools as excellent in 1975 and 1976 surveys. The young and college-educated were even more critical. People were most concerned, as they had been for seven of the eight previous years, about the lack of discipline in public schools.[36] Conditions could hardly have been less favorable for launching a governmentally imposed racial change in the public schools.

A Consensus Forms

Busing became a national issue distinct from school integration in the late 1960s and early 1970s. The major developments took place between 1970 and 1972, a period that brought the first major urban court orders, the first decisions in the North, the threat of suburban desegregation, and a presidential campaign emphasizing the issue.

At first public opinion about busing was confused. Basically the same question, if worded differently, produced different answers. By the early seventies opposition had become intense on virtually any question touching on busing.

The shift from indecision to polarized opposition is shown in two Harris Surveys. One, in 1971, found that Americans were willing to have their children bused for

[35]*Gallup Opinion Index* (December 1973), p. 25.

[36]Gallup polls, as reported in *New York Times*, December 17, 1975, and September 21, 1976.

court-ordered desegregation by a slim 47-41 percent majority. The next year, during the presidential primary campaigns, opponents outnumbered supporters almost 3-1.[37]

The early Gallup polls asked the question differently and got a more negative response. In 1970 and 1971 Gallup asked whether people supported "busing of Negro and white school children from one school district to another." The question not only neglected to say why they were bused but also could be read as referring to city-suburban cross-district busing. Because it ignored the goal, integration, respondents did not have to make the difficult choice. In both years less than one-fifth of the public supported busing.[38] Thus interpretation of many of the early polls is complicated because the questions contained misleading, inaccurate, or emotionally laden words like "racial balance" and "enforced busing" but rarely state the reason for busing.[39]

These subtleties, however, mattered less after the antibusing consensus formed. By the time of the 1972 election, responses were overwhelmingly negative even when the question was carefully phrased:[40]

In areas where the courts have found unlawful segregation of white and black school children the courts have ordered desegregation, including busing where necessary, so that whites and blacks will not be kept from attending school together. Do you favor or oppose such busing?

Favor	*Oppose*	*No opinion*
21%	70%	9%

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[37]Peter Gall, *Desegregation: How Schools Are Meeting the Historic Challenge* (Arlington, Va.: National School Public Relations Association, 1973), p. 7.

[38]*Gallup Opinion Index* (September 1971), p. 20.

[39]"Racial balance" was described as the goal of busing in a Harris Survey cited in *School Busing*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 92:2 (GPO, 1972), p. 1751; "enforced busing" was used in Watts and Free, eds., *State of the Nation*, p. 100.

[40]U.S. Commission on Civil Rights, "Public Knowledge and Busing Opposition" (1973; processed), p. A-1.

Numerous surveys since that time have shown similar polarization. A February 1976 national poll, for example, found that 71 percent, when asked if they favored "racial integration of the schools . . . even if it requires busing," were opposed.[41]

Causes of the Opposition

Obviously the question of busing raises a distinctive set of fears and beliefs. Available data permit analysis of some of these fears and speculation about others.

People are deeply divided, for instance, about the consequences of desegregation for education and for improving race relations. A 1971 Gallup poll showed that people believed that integration improved education for blacks, but only by a relatively narrow majority of four to three. Most respondents thought it had not helped white children: fewer than one in four thought integrated schools were better for whites,[42] and a large number were convinced that education was downgraded for whites. A 1971 poll found that only 15 percent of whites thought court-ordered integration had a good effect on children in general and 60 percent believed it had a bad effect. Two out of three blacks believed the opposite.[43] When asked in 1972 whether the Supreme Court had "ordered busing in spite of evidence that it would harm a child's ability to learn," 41 percent of the respondents thought the Court had done this, and only 31 percent disagreed. When asked whether "white students' test scores have fallen sharply in desegregated schools," more than one-fourth of the respon-

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[41]New York Times-CBS Survey, *New York Times*, February 13, 1976. Similar results were reported in a May 1976 *Washington Post* poll, which found 76 percent opposition, *Washington Post*, May 16, 1976.

[42]Stanley Elam, ed., *The Gallup Polls of Attitudes Toward Education*, 1969-1973 (Bloomington, Ind.: Phi Delta Kappa, 1973), pp. 112-13.

[43]Opinion Research Corporation poll data reported in Sandra Kenyon Schwartz and David C. Schwartz, "Convergence and Divergence in Political Orientations between Blacks and Whites: 1960-1973," *Journal of Social Issues*, vol. 32 (Spring 1976), p. 66.

dents, both white and black, thought this had happened. Public confusion was evident also in the large numbers of people unable to express an opinion on these issues. Those who believed that white students' scores had dropped sharply after desegregation were more than twice as likely to oppose integration as those who did not.[44]

Many people had accepted as true the claims of busing critics. The majority of both whites and blacks, for instance, thought that busing expenses were more than ten times the actual average local cost. Although the cost was usually about 2 percent or less of a school system's budget, six people in seven polled in 1972 thought it was at least 25 percent. Only one person in six could correctly answer more than half of a short list of true-false factual questions about busing; two out of five either got every question wrong or answered only one correctly. The skewed results, the Civil Rights Commission concluded, showed that people had been actively and successfully "misinformed" about the issue by public leadership. The more accurate a citizen's information, the more likely he or she was to oppose antibusing legislation.[45]

In view of public concern about discipline in all schools and antibusing speeches about endangering children, one would expect whites to fear disorder or danger to children in ghetto schools. A 1977 survey in Los Angeles found that 65 percent of white respondents believed that "desegregation will risk the safety of students."[46]

The Persisting Dilemma

Poll data that consistently show three out of four

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[44]Opinion Research Corporation, "Public Knowledge and Attitudes Regarding School Busing," report to Commission on Civil Rights, November 1972 (processed), p. 27.

[45]Ibid.

[46]Los Angeles Unified School District, "Results of L.A.U.S.D. Survey," submitted to the Superior Court for the County of Los Angeles, June 6, 1977 (processed).

people against a policy suggest firm, polarized opinion on an issue. The important thing to remember in this case, however, is that these strongly held attitudes coexist with continued affirmation of integrated education as a national goal. The condition for achieving closed minds about busing is success in insisting that it and integration are separate issues.

Virtually all of the court decisions and voluntary local plans, however, are based on exactly the opposite conclusion — that busing is the *only* available way to end urban segregation. In the cities, the courts have found, the issues cannot be separated.

When the Opinion Research Corporation in 1972 asked questions forcing respondents to choose between busing and segregation, its field staff encountered stiff resistance to answering them. Administering the questions took twice as long as normal and many respondents asked the interviewers to stop the interview and note that they were not prejudiced.[47] The answers to the questions were far more complex than those produced by most polls. Although only 21 percent of the respondents favored busing when asked about the question in a general way, a follow-up question showed that another 15 percent would support using existing school buses on new routes to increase integration. (This would accomplish substantial desegregation in many districts.) Among those still opposed, another 7 percent said that they would support busing as a "last resort" if they were convinced that there was no other way to overcome unlawful segregation.[48] In the end, more people supported some kind of busing, under some conditions, than opposed it. Among blacks, 71 percent favored some busing if essential for desegregation and 16 percent opposed (some had no opinion).

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[47]Comments made to author by Frederick Mason, vice-president, Opinion Research Corporation, November 1972.

[48]Commission on Civil Rights, "Public Knowledge and Busing Opposition," p. 9.

Table 4-2. *Public Attitudes toward Integration and Busing, 1974*
Percent

Policy favored	*All respondents*	*Black respondents*
Integration, even with long-distance busing	6	18
Maximum integration with short-distance busing	16	14
Voluntary open enrollment and busing	20	15
Neighborhood schools	50	33
Don't know	8	10

Source: Potomac Associates poll conducted by Gallup, reported in Watts and Free, *State of the Nation 1974*, pp. 109-10.

Related questions were asked in a 1974 survey examining preferred policies on education and race (table 4-2). Forty-two percent of the respondents supported some kind of busing and 50 percent supported a strict neighborhood school policy. A 1972 Harris Survey showed that a major factor in the strong opposition of whites to busing was the fear of reverse busing of white children into central city ghetto and barrio schools. The pollsters found that although three-fourths of the public opposed busing in general only 46 percent opposed one-way busing.[49]

There is little evidence to support the assertion that either busing per se or attachment to neighborhood schools was the cause of white opposition. A 1975 Harris Survey reported that 74 percent of the respondents were opposed to "busing school children to achieve racial balance." The survey also discovered, however, that the children of many of the parents who responded critically were already being bused for other reasons (52 percent of public school students in the United States ride the bus to school). By a 9-1 majority, these parents reported that busing was convenient; seven in eight expressed general satisfaction with their children's busing.[50] In other words,

[49]Schwartz and Schwartz, "Convergence and Divergence," pp. 157, 158.

[50]Harris Survey, news release, October 2, 1975.

when people were asked about desegregation, they said they were really only opposed to busing, but when they were asked about busing, they said that it was fine unless it was required for integration.

Table 4-3. *Preferred Means of Achieving Integration in Schools, 1973 and 1975*
Percent

Policy favored	*1973*	*1975*
Low-income housing in middle income neighorhoods	22	18
Alter school boundaries	27	31
Busing	5	4
Do something else	22	19
No opinion	17	11
Oppose integration	18	17

Sources: *Gallup Opinion Index*, October 1973, p. 14, and February 1976, p. 10.

A very different set of questions asked by the Gallup poll in 1973 and 1975 showed that though busing had little intrinsic appeal most people still wanted to do something to achieve integration in urban schools. When asked "Which, if any, of these ways do you think would be best to achieve integration in public school?" only about one-sixth of the respondents opposed integration (table 4-3). Given the choice of doing something other than busing — and the question clearly implied that there was a feasible choice — most preferred not to rely on buses. (This survey has frequently been cited on the floor of Congress as proof that 95 percent of the public opposes busing. However, the questions were not actually about busing but about *preferred* means to achieve integrated education.) Almost one-fifth of the respondents said they were prepared to support a change in housing policy calling for building low-income housing in middle class communities and almost one-third would support altering school boundaries to increase integration.

Boundary changes are nearly always part of a deseg-

regation plan and are often sufficient for small communities. In large cities, however, such changes tend both to leave most schools segregated and to accelerate racial transition in the neighborhoods immediately adjoining the ghetto, intensifying the very process that undermines stable integration. Constructing low income housing in any neighborhood has been extremely difficult since the Nixon administration shut down the major low-income programs in 1973. If these factors had been included in the Gallup questions, the pattern of opinion on busing would almost certainly have been more ambiguous.

Taken together, these surveys show that a great many people wish to do something but that most are reluctant to accept the idea that busing is necessary. For most Americans, the busing issue remains separate from the question of integration.

Some of the basic assumptions, propounded by officials and widely accepted by the public, can be summarized quickly. Busing is very costly. It consumes dollars that could otherwise be spent on educational improvements. It damages the education of white middle class students and does not help minority students. Often it produces increased racial hostility. It tends to speed white flight and urban resegregation. Many of the busing plans are arbitrary and irrational schemes imposed by federal judges with no interest in education. Busing, in short, is described as an extremely expensive, irrational, disruptive, and counterproductive policy. Little wonder that millions of Americans have said they support integration but reject this apparently infeasible approach.

But the dilemma remains. Housing segregation is so severe and demographic trends so unfavorable that busing is the only way to achieve integration for the foreseeable future in many communities. Often the only choice is the one people most wish to avoid — busing or segregation.

* * *

EXHIBIT 40

EXCERPT FROM PREFILED WITNESS STATEMENT OF ROBERT DORSE
(Tr., p. 17)

* * *

Q. Isn't it then an accurate statement to say that Initiative 350 was designed specifically to stop the Seattle mandatory aspect of the Seattle Plan or any other mandatory plan such as Seattle and other school districts might adopt?

A. That's extremely accurate.

MR. HALL: I don't think I have any further questions.

MR. FRANKLIN: We don't waive signature or notice of filing on that.

* * *

EXHIBIT 41

EXCERPTS FROM PREFILED WITNESS STATEMENT OF ROBERT DORSE AND C. BEN CALEY
(Tr., pp. 15, 62, 63, 142-145, 154-159, 167)

* * *

accomplishing that, CiVIC sought to seek its termination through court action or initiative action?

A. That's not entirely accurate. We foresaw that the legal action — in fact, I don't know if I responded to you the same in a prior deposition — but the legal action was, at best, from our viewpoint a delaying action, and even if we had been successful in court there would be nothing to prevent the school Board from turning around and coming forth with exactly the same plan as they had done originally and doing it in a legal manner. We were challenging the manner in which it had been derived, and they could go back and do it all over again

legally. The purpose was just to delay the implementation of the plan until such time as 350 would become law, so one strategy was sort of complimentary to the other, it wasn't an either/or thing.

Q. Yet they were both a part of the total overall strategy of CiVIC?

A. Yes.

Q. The ultimate goal of which was to prohibit forced busing in the State of Washington?

A. That's correct.

Q. And most immediately, to prohibit the mandatory busing aspects of the Seattle desegregation plan?

A. That is correct.

* * *

of the schools a part of the Seattle plan?

A. Which point is that, Mr. Hall?

Q. Three.

A. Yes, that's part of the plan.

Q. Is the pairing of schools a part of the Seattle plan?

A. This is a part of the plan.

Q. Is the merging of schools a part of the Seattle plan?

A. Not to my knowledge.

Q. Is the questering of schools a part of the Seattle plan?

A. Not to my knowledge.

Q. Does the Seattle plan encompass a concept of grade restructuring, pairing, merging or questering?

A. Not to my knowledge.

Q. Isn't it true that Section III was devised specifically in response to the Seattle plan in an effort to enumerate those characteristics of the Seattle plan which could not be utilized as an indirect method of getting around the prohibitions of Initiative 350?

A. Not necessarily so because we were concerned about that paragraph from the standpoint that it was conceivable that the district, for instance, could reconfigure everything in the north end of the city, north of the ship canal, and make it grades one, two and three and, for instance, everything south of the ship canal would be grades four, five and six and the

school district would still be able to do that under Initiative 350, with the exception that the children would then, under 350, be protected only insofar as going to the nearest or next nearest school, but that would be possible.

Q. You started answering my question with the words "not necessarily," which leads me to believe that to some extent, the question I asked could elicit a yes answer.

A. Could you please say the question again?

MR. HALL: Could you find it for me?

(Last question read back by reporter.)

MR. DORSE: I'd have to answer yes.

Q. (By Mr. Hall) Mr. Caley, you were the legislative cochairman for CiVIC?

A. (By Mr. Caley) Yes.

Q. Was that the term?

A. Yes.

Q. Who was your other co-chairman?

A. Veda Jellen.

Q. How do you spell her name?

A. V-e-d-a, J-e-l-l-e-n.

EXHIBIT 6

CiVIC NEWSLETTER #1

Citizens for Voluntary Integration Committee

This is the first issue of the CiVIC Newsletter, the purpose of which is to inform CiVIC members and contributors of CiVIC's progress, goals, positions, needs and plans. Future newsletters will be issued as needed.

Members wishing to submit information to be printed in the newsletter should submit it to their particular committee chairperson or directly to the Newsletter Editor, Ted Planta, P.O. Box 46421, Seattle 98146.

To assure that members and contributors know who is responsible for what, CiVIC's officers, directors, committee chairpersons and their responsibilities are listed as follows:

CiVIC Officers

President	Bob Dorse
Vice President	Bob Groves
Secretary	Claudine Hundhausen
Treasurer	Alan Schmitz

CiVIC Committee Chairpersons

Legislative	Ben Caley
Legal	Sam Franklin
Fund Raising	Gwen Fraser
Education	Don Carr/Al Winston
Membership	Carol Tracy
Media	Claudine Hundhausen (acting)
Communications	Ted Planta

CiVIC Directors

Bob Dorse — Chairman

Ben Caley	Sam Franklin
Carl Coyle	Claudine Hundhausen
Bob Groves	Alan Schmitz
Gwen Fraser	Al Winston

Responsibilities:

President: Presides at all general CiVIC meetings. Acts as chief spokesman for CiVIC, including release of important public information.

Vice President: Presides in the absence of the President. Coordinates all committees. Coordinates speaking engagements, meetings and speakers bureau.

Secretary: Records the minutes of meetings.

Treasurer: Has custody of the funds of CiVIC. Prepares all necessary Federal and State reports including Tax reports, Public Disclosure reports, annual corporate reports, etc.

Chairman of the Board: Elected by the board to serve as presiding officer at board meetings.

Committee Responsibilities:

Legislative: Draft a viable initiative, collect sufficient signatures to validate and promote passage in November. Also to act as liaison between CiVIC and elected officials.

Legal: Pursue legal action to stop implementation of The Seattle Plan because it was unlawfully conceived.

Fund Raising: Raise funds for CiVIC with continuing need for expansion.

Education: Formulate a voluntary desegregation/ integration plan for quality education in the Seattle Public Schools.

Membership: Expand CiVIC membership.

Media: Maximize the effectiveness of our paid advertising . . . to generate PR news releases . . . to coordinate news coverage of CiVIC's activities. Generate layouts, designs, brochures, etc.

Communications: Communicate CiVIC information to the membership.

Legislative News

INITIATIVE #350 BALLOT TITLE: SHALL PUBLIC EDUCATIONAL AUTHORITIES BE PROHIBITED FROM ASSIGNING STUDENTS TO OTHER THAN THE NEAREST OR NEXT-NEAREST SCHOOL WITH LIMITED EXCEPTIONS? VOTE YES!

Excitement reigns in the CiVIC Legislative office as presses roll out ¾ million initiatives to go to the Spokane Spokesman Review, the Tri-Cities Herald and the Seattle Times for insertion as supplements to the Sunday papers.

Meanwhile, organizing of the doorbell campaign will crest the week of March 15. With the help of CiVIC

members the goal of 2,000 signature solicitors for Sunday, March 19, is within our reach.

Legislative committee leadership have been lobbying legislators state-wide and are gratified by the response we have received. We have commitments from certain legislators allowing us to do fund raising mailings over their signature. And from others, we have offers to do mailings seeking support and distribution of initiatives.

Reporters from CBS and L.A. Times among others have been in our offices to interview CiVIC workers.

For initiatives to mail to friends and relatives state wide, who will agree to solicit signatures or to distribute to businesses in your area call the CiVIC office 632-3170. Ben Caley

Legal News

We have a trial date of July 24, 1978 to stop implementation of The Seattle Plan.

We are confident that our initiative will pass all State and Federal constitutional tests and specifically will not violate the Equal Protection clause of the 14th amendment. Our initiative is modeled largely on the Federal Equal Educational Opportunity Act of 1974 that prohibits court ordered busing. The Equal Educational Opportunity Act of 1974 (Title II of Education Amendments of 1974) Section 1714(a) provides that no court, department, or agency of the United States shall order implementation of a desegregation plan that would require transportation of students to a school other than the school closest or next closest to their homes. Sam Franklin

Fund Raising News

A giant THANK YOU to all CiVIC members that responded to our request for a $10.00 check — a little GET WITH IT or those who have not. We were able to order the initiative paper and now printing is in progress.

The BAN THE PLAN MARCH has brought in approximately $5,000.00 with a few areas not completely turned in. You have all done a great job.

There are so many fun ways that we can raise funds for our goal. In Magnolia we raised $3,000.00 at a wine and cheese party and in West Seattle we raised $4,000.00 at a cocktail party. On April 7, there will be a Western Dance in the South end, and we hope to have a date soon for one in the North end. For ticket sales information call CiVIC 682-7127. We hope to get everyone — all over town — organizing coffee hours, desserts, spaghetti dinners, garage sales, etc. We have a big job to do, but we have lots of public interest and many many hard workers. Keep up the good work. Gwen Fraser

Education News

The education committee is continuing to gather and review voluntary approaches to school desegregation as implemented in cities of comparable size to Seattle (Gretchen Stephens). A copy of San Diego's Plan was received recently (Clara Lesher). The interests of special education students and parents are being studied and coordinated with the District (Terry Boies). Terry was also appointed by Dr. Moberly to the Citizens Committee for Academic Excellence. Data on academic excellence and accountability in education is being studied (Howard Jones). Effective 3/8/78 Don Carr and Al Winston will serve as co-chairmen of the education committee since former Chairman Dieter Jahns feels that his job with Boeing will involve too much travel out of town throughout the next few months to allow him to effectively run the committee. Dieter will continue to serve the education committee and CiVIC as an education consultant. He wants to take this opportunity to thank all education committee members who have contributed not only to the efforts of this committee but also all the other CiVIC efforts to date. Dieter Jahns

Membership News

We currently have approximately 2,500 members. We

are open to members from areas all over the State, so be sure to contact family and friends in other areas of the State. Membership forms are available at the CiVIC offices, or you can duplicate the one attached. Thank you for the work you have done so far and will continue to do for securing new members. Carol Tracy

Treasurer's Report

We have raised about $30,000 in cash and checks, and $10,000 in in-kind contributions. All these funds have already been spent on incurred expenses or are committed to printing and distribution of the initiative. Alan Schmitz

CiVIC School Meetings

Members are encouraged to take steps to arrange CiVIC community meetings in their schools. You can use any Seattle Public School Building to hold a CiVIC meeting. Simply go to the school principal's office and check to see if the date you want is available. Then, fill out the Building Use Permit form. Dr. Moberly has agreed with this. (There may be a charge of $4.40 per hour for use of the building but CiVIC will be happy to pay for this.)

CiVIC Speakers Bureau

The following people are available as speakers at CiVIC community meetings or any other applicable meeting: Bob Dorse, Vicki Schmitz, Ben Caley, Sam Franklin, Gwen Fraser, Bob Groves, Dieter Jahns, George Thompson, Kerry McMahan. Contact Bob Groves at 522-1769 or Vicki Schmitz at 283-1858 if you need a speaker. Also contact them if you would be willing to be a CiVIC speaker. We need speakers!

CiVIC Office Information

CiVIC North Office — Legislative
Phone 632-3170/632-3177
Hours 9:00 to 3:00 Weekdays

CiVIC South Office — Fund Raising & Communications
Phone 682-7127
Hours 9:30 to 4:00 Weekdays

(More volunteer help is needed at CiVIC South Office (on Harbor Island). Call Gloria Coyle, 932-5539, if you can spare even a few hours.)

Write a Letter!!

Write your elected officers — State and Federal Representatives, Mayor, and City Council. Let them know how you feel about forced busing. Write the editors of the Times and P-I and your local weeklies.

Past Chairman's Message

Because of compelling business reasons, my family and I have to move to California for 16 months. We made the same kind of temporary move six years ago for the same reasons and for the same period of time. Thanks to the efforts of a tremendous group of people, CiVIC is now well on its way to victory; and we look forward to re-enrolling our children in a totally voluntary program when we return next year. The new Chairman of the Board of CiVIC will be Bob Dorse, who will also retain his current role of President. Best regards, Gary F. Roe

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CITIZENS FOR VOLUNTARY INTEGRATION COMMITTEE (CiVIC)
P.O. Box 24245, Seattle, WA 98124

MEMBERSHIP APPLICATION FORM

Name_____ Date_____ Dues Paid $1.00
Address_____ City_____ Zip_____ Donation_____
High School Area_____ Child's School(s)_____ Total_____

CITIZENS FOR VOLUNTARY INTEGRATION COMMITTEE (CiVIC) is a non-profit corporation, the specific purpose of which is to:

A. Oppose the loss of freedom inherent in mandatory school assignments based on racial or ethnic identification: and
B. To promote quality education on an equal basis for all.

Membership is open to any person sympathetic to the aims of CiVIC. People of all racial and ethnic backgrounds are welcome.

Membership expires 12-31-78

Signature_____

Telephone_____

VOTE YES ON INITIATIVE 350

CITIZENS FOR VOLUNTARY
INTEGRATION COMMITTE (CiVIC)
P.O. Box 24245, Seattle, Washington 98124

STATEMENT OF FACTS

Citizens for Voluntary Integration Committee (CiVIC) is in favor of *honest* and *effective* integration of Seattle schools. We believe that the public has been deliberately misled regarding both the legal aspects and the actual results of mandatory busing.

FACT: Seattle is *not* under any real threat of a court order to implement a forced busing program.

FACT: In the latest U.S. Supreme Court decision, which caused the desegregation suit against Dayton, Ohio schools to be *dismissed*, it was established that racial imbalance of a school system did *not* violate the Constitution as long as the schools were not intentionally segregated by School Board policy.

> *"The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."* [*U.S. Supreme Court, 6-26-77*]

FACT: No Seattle School Board has intentionally created a policy that caused segregation. Even if the School Board fears that a court might find a previous action that caused some inadvertent segregation, it does not justify the massive mandatory busing program that they seek to implement — because a court could only redress the *incremental difference* in segregation that resulted from that action.

"If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental *segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that* difference, *and only if there has been a systemwide impact may there be a systemwide remedy."* [*U.S. Supreme Court, 6-26-77*]

FACT: An open enrollment policy, which the Seattle School Board is free to implement at any time, would remove even the last vestige of any real court threat.

FACT: While we must assume that Superintendent Moberly, as the professional in charge of presenting a school desegregation plan to the School Board *and to the public*, was aware of the above facts, his rationale of "better a Seattle plan than a court-ordered plan" was never presented within the framework of the above facts — *which the people had a legal right to know.*

RCW 42.30 OPEN PUBLIC MEETINGS ACT 42.30.010 Legislative Declaration. "The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

FACT: While the School Board has been telling us that we would lose HEW funds if we did not proceed

with their plan, the federal HEW budget has the Biden/Eagleton amendment which *prevents* HEW funds being used to require mandatory busing.

> *"None of the funds in this act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except to a student requiring special education, to the school offering such special education, in order to comply with title VI of the Civil Rights Act of 1964."*

FACT: *Forced busing causes segregation.*

- In San Francisco, since 1971 under an $18.5 million dollar mandatory busing plan, the number of racially balanced schools has decreased from 60 to 43.
- In Los Angeles, white enrollment dropped by 25,000 students and minority enrollment decreased by 1,000 as families fled from mandatory busing.
- In Washington, D.C., white enrollment dropped from 50% of the school district to 7% in a ten year period, following adoption of a mandatory busing plan.
- In Dayton, Ohio, white enrollment dropped from 52% to 46% in only one year.
- In Boston, since 1974, white enrollment has dropped from 58,000 to 29,000.
- Pasadena public schools lost 22% of its children in only two years; Norfolk lost 20%. In Memphis the loss of white students was 35% the first year of a busing program. And Atlanta has lost 60% of its white students since the start of forced busing.

FACT: While Superintendent Moberly has admitted that to fund the proposed busing program without pas-

sage of the levy *would hurt the quality of education,* various members of the School Board have continually maintained that even if the levy fails the busing program should proceed as planned.

FACT: Incredible as it may seem, six members of the Seattle School Board have taken it upon themselves to decide what is best for our children. In the name of "education," they are determined to proceed at any cost with their preposterous, counterproductive, massive mandatory busing program — with total disregard for the disruption of our city and our lives — with total disregard for the truth about the supposed inevitability of court action — with total disregard for the actual effects of mandatory busing.

FACT: The intent of the people in electing a School Board is for those elected representatives to administer the basic educational needs of the children. They were *never* given the right to inflict their own personal moral standards on the people who elected them. "The people of this state do *not* yield their sovereignty to the agencies which serve them."

FACT: We, the people, have an historic obligation to maintain our freedom of choice, both for ourselves and for our children.

CITIZENS FOR
VOLUNTARY
INTEGRATION
COMMITTEE (CiVIC)
12-29-77

CITIZENS FOR VOLUNTARY
INTEGRATION COMMITTEE (CiVIC)
P.O. Box 24245, Seattle, Washington 98124

POSITION PAPER

1. Citizens for Voluntary Integration Committee (CiVIC) is a non-profit corporation, the specific purpose of which is to:
   A. Oppose the loss of freedom inherent in mandatory school assignments based on racial or ethnic identification; and
   B. To promote quality education on an equal basis for all.
2. Membership is open to any person sympathetic to the aims of CiVIC. People of all racial and ethnic backgrounds are welcome.
3. Our goals will be achieved through the legislative process, through whatever legal action is necessary, and by informing the public of what we are doing, why it is necessary, and how they can help.
4. We will not argue whether the Seattle School Board has the authority to implement the proposed mandatory busing program. We will simply use the legal and legislative process to remove that authority.
5. Eventual policy regarding the coming school levy, or possible recall of the School Board, will be determined at the appropriate time — based on our primary concern for long-range quality education.
6. We believe that even a moderately successful voluntary program will do far more to improve our interracial relations than a set of numbers showing compliance to an arbitrary quota.
7. We believe that an open enrollment policy, where essentially any student can attend any school in Seattle, is the best way to integrate our schools.
8. We would like to work directly with the Seattle School Board in creating a voluntary integration progam

based on open enrollment — as soon as they eliminate all mandatory aspects, including mandatory backup, from their considerations.

9. We believe that mandatory busing is unacceptable to any person who values individual freedom.

10. We are not militant — but we are determined.

/s/_____

Gary F. Roe
Chairman of the Board
12-29-77

EXHIBIT 10

350 IS FOR OUR NEIGHBORHOOD CHILDREN

Initiative 350 will return common sense to our city schools. It will save tax dollars. End unnecessary busing. Preserve our neighborhood schools. And stabilize our neighborhoods.

Initiative 350.

It guarantees children the right to attend the school nearest or next nearest their home.

It allows for exceptions, such as health, safety hazards, physical barriers, unsafe conditions, or overcrowding.

It makes sure students with special problems may be assigned to schools which meet their unique needs.

It protects the right of students to choose voluntary or optional programs.

And it keeps Seattle children in neighborhood schools.

So vote yes on Initiative 350.

For the children. And the city.

Paid for by: C.I.V.I.C.
Citizens for Voluntary Integration, P.O. Box
30054, Seattle, WA 98103, (206) 632-3177
Robert Dorsk, President

51 DATE 1/11/89

ACEB PUPUNA

SAVE OUR NEIGHBORHOOD SCHOOLS

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WE NEED NEIGHBORHOOD SCHOOLS.

Initiative 350 is a proposed state law which would guarantee children the right to attend the school nearest or next nearest their home. It would end the inconvenience and expense of the present mandatory busing program in Seattle. And most important, it would preserve our neighborhood schools.

This year, over 9,500 children in Seattle lost the right to go to their neighborhood schools. Initiative 350 would return these children to their neighborhoods, because it prevents school administrators from assigning children to schools other than those close to their homes. And that's important, because neighborhood schools help hold our neighborhoods together. They work to create a feeling of community. A sense of pride.

Without 350 our neighborhoods will suffer as families move to other communities which have kept their neighborhood schools.

Without 350 our children won't be taught down the street, but across the city as part of a mandatory school busing program.

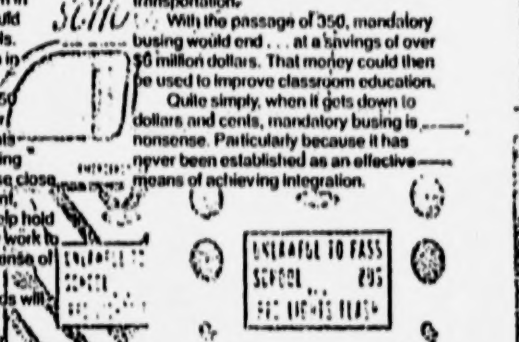
DOLLARS WASTED ON BUSING NONSENSE.

While mandatory busing is disrupting the strength of our neighborhoods, it's also costing the taxpayers a pretty penny.

Busing in Seattle presently costs over $480.00 per student . . . three times what other school districts in our state spend on transportation.

With the passage of 350, mandatory busing would end . . . at a savings of over $8 million dollars. That money could then be used to improve classroom education.

Quite simply, when it gets down to dollars and cents, mandatory busing is nonsense. Particularly because it has never been established as an effective means of achieving integration.



SEATTLE'S BEING TAKEN FOR A RIDE TO NOWHERE.

Busing is hardly a new idea. It's been tried in Detroit, Boston, Atlanta, Cleveland and San Francisco . . . and studies show that those programs have not resulted in real integration. Instead, they've helped create real problems. Families have moved out of the cities and into the suburbs to avoid busing. They've dropped out of the school system . . . and the pattern seems to be repeating itself in Seattle. Mandatory busing was introduced to our area by bureaucrats and administrators. Since then, one out of every ten students has dropped out of the Seattle school system. And more forced busing is planned for next year.

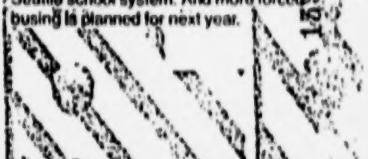


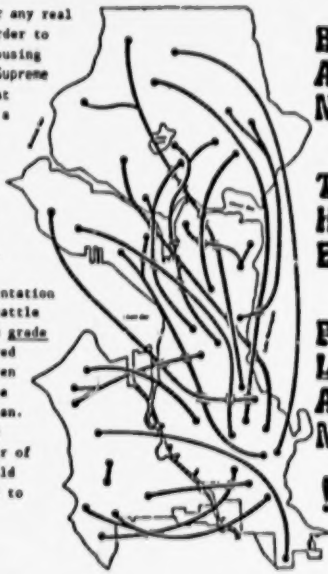
EXHIBIT 15

The Government has not said Education is a 2 hour bus ride!



Seattle is NOT under any real threat of a court order to implement a forced busing program. The U.S. Supreme Court has stated that racial imbalance of a school system does NOT violate the Constitution as long as the schools were not *intentionally* segregated by School Board policy.

This graphic representation of the so-called "Seattle Plan" only shows the grade schools to be involved -- with 9,200 children forcibly bused in the first year of the plan. *Your children may be next:* the second year of mandatory busing would increase this number to 16,000 children.



BAN THE PLAN!

This is the Moberly Plan which forces children to leave their neighborhood schools in a scheme based solely on racial identification -- and which would waste millions of our tax dollars that might otherwise be spent to improve the education of every child in our state.

So far only 6 unrepresentative Seattle School Board members have voted for forced busing. We believe that every taxpayer in our state has the right to decide how our education dollars should be spent.

We need your help to secure our freedom through legal and legislative action.

Ex 10 b/c

Phone 9:30 to 4:00 Weekdays
682-7127 632-3170 632-3177

CITIZENS FOR VOLUNTARY INTEGRATION COMMITTEE (CIVIC)
P.O. Box 24245, Seattle, Washington 98124

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October 20, 1978

Dear Editor:

Please examine *both* sides of the Initiative 350 question which will be on the November 7 ballot.

It is a very simple initiative which will guarantee the right of children to attend the local *neighborhood* schools. Unfortunately, much misinformation has been circulated by 350 opponents in an effort to confuse the public.

Initiative 350 will directly impact Seattle's mandatory busing program. Seattle is the first school district in the state to generally require students to attend a school that is not close to their home. 350 would prohibit — with necessary exceptions — those types of mandatory (far away from home) student assignments from being made in the future. The current operations of 99% of the local school districts in the state would not be directly affected by Initiative 350's passage. Even though 350 does not have any direct impact on other school districts, it does have great statewide significance.

With the advent of statewide funding of schools, every citizen in the state should be interested in how efficiently *all* school districts are operating. Seattle currently spends three times what other school districts spend on school transportation. $480 per student a year for a mandatory cross-city busing program that does not result in better education for anyone or in any more real integration. Taxpayers throughout the state are paying for mandatory busing. State tax money is being diverted senselessly out of the classroom and onto the city streets.

Don't take our word for it that a vote "Yes" on Initiative 350 is the wisest course of action. Read what State Senator Hubert Donahue (D. Dayton) and State Senator Jim Matson (R. Selah) say about the initiative. They've joined such other respected citizens as retired King County Superior Court Judge William L. Wilkins; J. Dorm Braman, former Mayor of Seattle; Orville L. Barnes, Member, State Board of Education; and State Representa-

tive William L. Polk in making a strong statement in support of Initiative 350 (see over).

Please read their statement and if you have any questions regarding Initiative 350, I can be reached at (206) 284-2610.

Sincerely,

/s/_____
Robert O. Dorse
President, CiVIC

EXHIBIT 43

EXCERPTS FROM PREFILED WITNESS STATEMENT OF VEDA LODA JELLEN
(Tr., pp. 7-12)

* * *

Q. What is your employment background?
A. I worked for several years in the field of credit; later for a real estate company and finally for a mortgage company in the preparation of documents for submission to back East banks. We brokered mortgages to back East banks and I prepared those packages for sale.
Q. How did you happen to be the individual who had the responsibility for doing the initial spade work on the initiative?
A. Probably because I had felt for some time that other anti-mandatory bussing groups were headed in the wrong direction and I felt that creating new state law to change the options of the school districts was in order.
Q. Showing you a backside of Krauss Exhibit 6, could you point out the language which relates to that language you drew out of the recent HEW Appropriations Bill?
A. Yes. Section 1 originally when this first started now. Okay. When it was just simply a bare-bones thing. The

language in the HEW Appropriations Bill, Section 208 states, none of the funds contained in this act shall be used to require school district to transport students further than their nearest school.

And then it goes on to use some of the language in our Section 3. The language reads, shall be used to require directly or indirectly. I believe the HEW Appropriations Act shall be used directly or indirectly. And then that same paragraph, that same section in the HEW Appropriations Act goes on to say directly or indirectly; includes the reorganization of grade structure of schools, the pairing of schools, the clustering of schools. So we used that as a basis. Then we attended — members of the Committee attended some of the transportation subcommittee hearings in Olympia where the transportation subcommittee of the House Appropriations Committee was listening to School District superintendents and transportation officers talking about how the nearest school language that was at that time being considered for use in the transportation bills in Olympia might affect their school districts and we took some notes there and then Sam or Dieter Jahns, I guess it was, sent out a letter to who was at that time working on the plan; had sent out a letter to all three hundred school districts across the state asking how that nearest school language might affect them. And so we used the responses to letters also in the development of this.

It was our goal to make this initiative measure as flexible as possible not to interfere with the development of any program in any school district except where they might use mandatory bussing.

Q. Mandatory bussing for any reason?

A. That's kind of a complex question because I personally believe that school districts who are committed to using mandatory bussing to achieve racial integration might very well use another reason for — at least state another reason, you see, for implementing that plan. They might for instance, say that the pairing of schools

offered a better education when indeed their goal was really integration if the initiative was directed strictly to a racial integration of schools.

Q. Then what?

A. What?

Q. If the plan was —

A. If the initiative had been directed to its correcting racial imbalance, if the initiative had said they may not use bussing beyond the nearest or next nearest school to the purpose of correcting racial imbalance, then a school district whose — whose goal might be the integration of the schools could still adopt a pairing plan and say, well, this plan isn't really for integration, it is just to achieve better education. I consider that a not very remote possibility.

Q. What if the mandatory bussing was not for the purpose of achieving racial integration but was indeed for the purpose of furthering, in some positive fashion, the education of some students; what is the position?

A. I can't conceive that mandatory bussing would be necessary for that kind of a problem.

Q. Are you aware of the fact that many school districts in the state transport students beyond their nearest or next nearest school for reason of balancing out the population of buildings or for the reason of to take state funds for transportation for a lot of reasons that don't relate in any way to racial problems?

A. Yes. And we tried to cover those in our exceptions. I think we have pretty well covered those in the — which is getting more funds for transportation. As a taxpayer I would question the validity of that kind of a decision.

Q. These letters that Mr. Jahns sent out to the 300 plus or minus school districts in the state, do you recall or know how many returns the CiVIC received from those districts?

A. I'm afraid I would have to just guess and it probably is best that I don't do that.

Q. Was it a substantial number; was it half?

A. No, I don't think we got a half response. I think maybe

10 or 15 percent might be more accurate.

Q. So that would be somewhere between 30 and 45, 50 returns or so?

A. Yes. I'd have to go back and see the stack and count them but I would say that's probably closer to it.

Incidentally, those schools, those school districts that did show some concern, and there were a couple of very valid concerns, and those were included in the development in the language of the initiative.

Q. Do you recall those districts in particular?

A. One in particular mentioned the fact that any language which used that kind of, you know, nearest school language, it should be very clear that it was within the — within that school district. So that you didn't find yourself, you know, force a child out of a district.

Q. Yes.

A. That was one of them.

Others were talking about the physical barriers that might be found between a student's — between a student's home and his nearest school. Some of them mentioned special education, by the way, and, of course, because the letter didn't relate, you know, specifically to the initiative special education nevertheless was part of the Biden/Eagleton Amendment of the HEW Appropriations Act and had already been included and some of their concerns already had been included in the initiative.

Q. Were Sam Franklin and —What's Oliver's first name?

MR. FRANKLIN: Jim.

Q. (By Mr. Hall) — Jim Oliver the only lawyers who CiVIC conferred with in connection with the drafting of Initiative 350?

MR. FRANKLIN: Wait just a minute.

Counsel, I let you go on on this Initiative 350 because I don't see any harm. I really want to know at this point what the relevancy is to this lawsuit? We are not trying Initiative 350 in any way.

MR. HALL: I realize that. The relevancy is this, and it goes to the motive of the plaintiff in these

proceedings and the objectives processes used by the plaintiff to achieve the self-stated goals of the organization.

MR. FRANKLIN: Well, that's not good enough. I am going to instruct her not to answer any more questions about Initiative 350 unless you can tell me specifically — I am happy to cooperate if you can tell me how inquiry about 350 relates to any of the issues

* * *

EXHIBIT 68

PREFILED WITNESS STATEMENT OF DOROTHY HOLLINGSWORTH

I have been a Seattle resident for 33 years. For seven years I was an employee of the Seattle School District. During that time I served as a social worker for four years and as the Director of the Headstart Program for three years. Since 1969 I have been an employee of the City of Seattle and presently serve as Director for the Division of Children's Services, Department of Human Resources, City of Seattle. In November 1975, I was elected to the Seattle School Board, and I have served on the Board from December 1975 to the present time. I am the only minority member of the seven-person Board. I have personal knowledge concerning the facts set forth below and I am competent to testify thereto.

I am from the South and am familiar with the human loss which occurs when people are denied full involvement in society. I believe that separate education for minorities cannot be equal. To demonstrate my commitment to desegregation, I placed my child at Eckstein Middle School in Seattle's north end in 1963 when Seattle's Voluntary Racial Transfer (VRT) Program began, even though the School District at that time did not provide transportation to and from our Central Area home.

Desegregation of the Seattle Schools is one of the issues I campaigned on when seeking election to the School

Board. I believe that when majority and minority children go to school together the attitudes of both are improved. Teachers' attitudes and performance expectations for a diverse student body may be improved over attitudes and expectations for children in racial isolation. Because the purpose of education is to provide an opportunity to succeed in this world, children have to learn to see themselves as part of an entire culture and not as just an isolated group. Participation in an integrated social system must become a part of their entire personality development.

The Seattle School District is divided into seven director districts. Each geographic district has one seat on the seven member Seattle School Board. Primary elections are held within the director districts. The two highest vote getters in each director district at the primary then are voted on by the entire school district in the general election. The director district I represent is predominantly minority, and in recent times has consistently elected blacks to the School Board and to the State Legislature (37th Legislative District). Until Seattle in the 1960's went from five to seven Board positions with director districts instead of all City-wide elections, blacks did not have a voice on the Board. Senator (then Representative) George Fleming of the 37th District was a sponsor of the change.

I support the desegregation plan adopted by the Board because it fulfills the Board's June 8, 1977 resolution and gives managerial control over movement but allows for educational options as well. The plan is fiscally sound and allows for continuity and stability in educational planning and programming. Movement of whole neighborhoods helps to maintain neighborhood cohesiveness, which is important to minority communities.

I feel the Board's action to voluntarily desegregate without court or federal agency compulsion is sound educationally, responsible, and beneficial to the community. The plan the Board adopted was the only way to assure equity of movement. Equity had to be a part of the plan for the minority community to accept it.

Based on my long time residence in Seattle and my extensive past involvement in public affairs of the community, I feel qualified to state that if Initiative 350 is implemented and the Seattle Plan dismantled, the response of the minority community — especially the black community — could well be to withdraw from carrying the burden of desegregation as they have in the past. The inability under Initiative 350 to desegregate Seattle's public schools (as the Seattle Plan has done) would deprive minority people in Seattle of political and educational goals which are extremely important to them. The immense financial expense of trying a major desegregation lawsuit, with uncertain results, would place a tremendous burden on minorities in comparison with the gains in educational policy which minorities in Seattle have achieved through the local political process. It is likely that many minorities who have in the past volunteered for desegregation would take Initiative 350's implementation as the white culture's rejection of equitable public school desegregation, and return to neighborhood minority schools to work on building strong minority schools. This heightened separatism would, of course, also reduce the number of available placements in near-capacity mostly minority schools, so that fewer white students, even if willing, could volunteer for a desegregation program.

EXHIBIT 93

PREFILED WITNESS STATEMENT OF DR. CHRISTINE ROSSELL

I am an assistant professor of political science at Boston University, and a member of the National Review Panel on School Desegregation Research. Exhibit A is a copy of my current professional vita, which accurately summarizes my academic training, professional experience and publications. The citations indicated in my various publications listed in Exhibit A indicate the type of facts or data upon which I rely in making the conclusions set forth in this statement. These facts and data are of the

type reasonably relied upon by experts and social scientists in the field of public school desegregation in forming their opinions.

Everyone would be in favor of voluntary desegregation if it actually desegregated. The most successful voluntary desegregation plan as of June 1978 is the Milwaukee magnet school plan implemented in Fall 1975 (which this year was altered to include significant "mandatory" assignment). (The most successful as of June 1978 is the San Diego voluntary desegregation plan.) The Milwaukee plan reduced the level of segregation in the Milwaukee school system by 23 percentage points,* but the program failed to attract substantial numbers of white students out of their neighborhood schools In Fall 1975, only three percent of the white student population opted for transfers to magnet schools and only two percent transferred to inner city magnet schools despite the judicial threat of increased mandatory desegregation if the voluntary plans did not desegregate sufficiently. By Fall 1977, the index of dissimilarity (level of segregation between whites and minorities) was 44.8. This figure means that almost 45 percent of all minority students would have to be reassigned from the schools they are presently attending to predominately white schools in order to have each school racially balanced. This is hardly a successful desegregation plan.

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*Measured by the "Index of Dissimilarity." This measure (D) is a standardized measure of racial imbalance or segregation which uses the school district's racial composition as its standard. For example, if a school district is 50 percent minority and 50 percent white, all schools would be "balanced" at 50 percent minority and 50 percent white. The index measures the degree to which they deviate from this and the number itself represents the proportion of minorities who would have to be reassigned if no whites are reassigned, in order for every school to have the same proportion as in the whole school system. (The hypothetical school system mentioned above would receive a score of 0 — *i.e.*, no reassignments necessary.)

A second measure of desegregation's effect is a measure of interracial contact, the proportion white in the average minority child's school. This measure (Smw) is unstandardized and is both a function of racial balance in each school and the proportion white in the whole school

In San Diego, California, which has a voluntary only desegregation plan implemented in the fall of 1977, racial segregation (D) (the proportion of minorities who would have to be reassigned) actually *increased* in 1977. At the same time, interracial contact Smw (the proportion of white students in the average minority students' school) *decreased*. San Diego is sometimes cited as an example of a successful voluntary desegregation plan.

My research comparing the effects on racial segregation (D) and interracial contact (Smw — the proportion white in the average minority students' school) of (a) voluntary only, and (b) mandatory with magnet schools, suggests that the latter type of desegregation plans are most effective in achieving desegregation using the measures described above. The data I have examined from the Seattle School District indicates that the combined mandatory and voluntary magnet school aspects of the Seattle Plan have significantly contributed to the success of the Seattle Plan in reducing the index of dissimilarity and increasing the proportion white in the average minority students' school.

The experience of some school districts suggests there may be a problem of resegregation in magnet-only plans, if there is not the system-wide control of racial balance found in plans with mandatory components. In a magnet-only plan, the white families who volunteer for magnet schools are often "fleeing" a predominately minority school in a changing neighborhood.

My research on magnet school plans as desegregation

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district. It is useful in comparing the relative effectiveness of "mandatory," mandatory plus magnets and options, and totally "voluntary" plans. It indicates the net increase with desegregation in the proportion white in the average minority child's school because it reflects any decline in white enrollment.

Smw differs from the index of dissimilarity, a measure of racial imbalance, in the following way. A school system which racially balanced its ten schools so that there were 500 blacks in each school and 10 whites in each school would have a perfect racial imbalance score of zero. However, the small number of whites in each school limits the amount of interracial contact and hence it would receive a poor Smw score of .002-2/10ths of a percent white in each school.

tools indicates desegregation plans with both voluntary and mandatory aspects are more than twice as effective in terms of increasing racial balance than are the magnet-only plans in school districts above 30 percent minority (a copy of my February 1979 paper is attached as Exhibit B). In addition, mandatory plans with magnet schools are one and a half times more efficient than magnet-only plans in increasing and obtaining a high level of interracial contact in school districts above 30 percent minority. The proportion minority is an important contextual variable affecting the outcome of magnet school plans because school systems with greater than 30 percent minority student population typically have a greater long term decline in white enrollment. More importantly, it is much more difficult to voluntarily desegregate a school system above 30 percent minority because such a large proportion of whites need to volunteer for magnet schools in a school system with a large proportion of minorities. Hence, there is a ceiling on how much desegregation can be accomplished with a voluntary plan in these school districts.

EXHIBIT 94

JOINT STATEMENT OF SEATTLE BLACK COMMUNITY LEADERS

We, the undersigned, make this joint statement of our perception of the views of the black community in Seattle as to desegregation of public schooling. Our long-time residence in the Seattle area and our extensive involvement in public affairs in the black community and in the community at larege are the bases for our standing to make this statement. Attached hereto and incorporated herein are our respective resumes which reflect our positions and our activities.

We support the Seattle Plan because it fulfills the Seattle School Board's June 8, 1977, resolution to desegregate Seattle's public schools and because the plan is equitable. Historically in Seattle the burdens of reducing segregation have fallen disproportionately on blacks. The

Seattle Plan, with its pairing and triading of schools and its movement of entire neighborhoods by bus, is the only way to ensure equity of movement, that is, minority and white students sharing equally the inconvenience of busing. This equal sharing had to be a part of the plan for the black community to accept and support it. An additional advantage of the plan is that the movement of entire neighborhoods helps to maintain neighborhood cohesiveness, which is important to blacks in the city.

We feel qualified to state that the Seattle School Board's action to voluntarily desegregate the public schools without court or federal agency compulsion is beneficial to this community because it shows the extent of the Board's commitment to an equitable desegregation plan, it raises the black community's trust in a public institution, the Seattle School Board, and it helps to create a healthy civic climate for blacks.

Further, we feel qualified to state that if Initiative 350 is implemented and the Seattle Plan is thereby dismantled, the response of the minority community — especially the black community — could well be to not participate in a voluntary busing program. Many blacks would consider the implementation of Initiative 350 to be the white community's outright rejection of equitable public school desegregation. Many blacks would turn their attention and energy to neighborhood minority schools and the result would be a highly segregated public school system.

The immense expense and substantial delay resulting from a trial of a desegregation lawsuit brought against the School District would place a tremendous burden on the black community. Housing and employment are also segregated in Seattle (as the schools would be but for the Seattle Plan) and health and welfare programs are often racist. The black community is making a concerted effort to end segregation and racism in all forms in this community. A major desegregation lawsuit would substantially detract from efforts in those other major areas of concern.

The Seattle Plan is the result of a political

determination in Seattle that the public schools should be desegregated without court or federal agency intervention. The important black political and education goal of desegregated public schools has been realized in Seattle through the local political process. If Initiative 350 is implemented in Seattle (*i.e.*, the Seattle School District does not assign students to other than their nearest or next nearest schools to reduce racial imbalance), these black political and educational gains would be irretrievably reversed. Not only would the Seattle Plan be dismantled and the public schools resegregated, but future school board action to desegregate the schools (except under court order) would be precluded. The realization of the black political and educational goal of desegregated schools at the local school board level would be impossible, no matter what the local political consensus is and no matter how educationally beneficial school desegregation is.

/s/_____
Fred E. Stephens

/s/_____
Larry Gossett

/s/_____
Meredith Mathews

/s/_____
Jerome W. Page

/s/_____
Lacy Steele

/s/_____
Charles Z. Smith

/s/_____
Samuel B. McKinney

EXHIBIT 95

EXCERPTS FROM PREFILED WITNESS STATEMENT OF DR. MICHAEL J. STOLEE

I. Identification

My name is Michael J. Stolee, and I live at 7033 North Lombardy Road, Fox Point, Wisconsin 53217. I am Dean of the School of Education and Professor of Administrative Leadership at the University of Wisconsin-Milwaukee. My office address is 595 Enderis Hall, 2400 East Hartford Avenue, P.O. Box 413, University of Wis-

consin-Milwaukee, Milwaukee, Wisconsin 53201. I live with my wife, Marilyn S. Stolee. We have two daughters; Meg, a doctoral student at Duke University, and Anne, a sophomore at Yale University.

II. Education

I attended the public schools of Minneapolis, Minnesota, graduating from Patrick Henry High School in January, 1948. From 1948 to 1952, I attended St. Olaf College in Northfield, Minnesota, graduating with a Bachelor of Arts degree with majors in speech and history. In 1959, I was awarded a Master of Arts degree with a major in educational administration from the University of Minnesota, which also granted me the Doctor of Philosophy degree in educational administration in 1963.

III. Professional Experience

I was a high school teacher of history and speech for two years, a high school principal for two years, and a superintendent of schools for five years, all of which was in rural Minnesota from 1952 to 1961. During doctoral study at the University of Minnesota, I was a part-time instructor (50% first year, 75% second year) supervising student teachers and making comprehensive surveys of contracting school systems.

From 1963 to 1965, I was an Assistant Professor of Education in Administration at the University of Miami, Coral Gables, Florida. During this time, I was co-director of the first training program in the United States funded under Title VI of the Civil Rights Act of 1964 (P.L. 88-352). During the 1965-66 year, I was an Assistant Professor of Educational Administration at the University of Massachusetts, Amherst, Massachusetts.

I returned to the University of Miami in 1966 as an Associate Professor of Education in Administration, and was later promoted to Professor. My administrative duties included Director of the Florida School Desegregation Consulting Center (hereinafter referred to as FSDCC), Coordinator of Graduate Studies, Director of the TTT pro-

gram, Director of the Cuban Teacher Retraining Program, and Associate Dean of the School of Education. I left the University of Miami to take my present position in September, 1975.

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EXCERPTS FROM EXHIBIT A TO EXHIBIT 95

Desegregating Urban Schools
GORDON FOSTER

* * * employed. In the Detroit metro plan presented by Judge Roth's panel, the sixteen clusters that combined at least one Detroit high school constellation with several suburban districts generally used the skip zoning technique.[29]

Site Selection and Construction Policies

Where schools are built; whether they open as segregated or desegregated schools; and how building additions, portable buildings, and regular buildings are used are all important factors in the desegregation of pupils. The Supreme Court in *Swann* stated:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have an important impact on composition of inner city neighborhoods. . . . In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight . . . it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system.[30]

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[29]The Panel's "Response to the Court's Ruling on Desegregation Cases and Order for Development of Plan of Desegregation," July 29, 1972, *Bradley v. Milliken* 345 F. Supp 914 (E.D. Mich. 1972).

[30]*Swann v. Charlotte-Mecklenburg*, 420 U.S. 1 (1971).

Judge Real in the Pasadena case[31] ruled that "when school officials have located new schools and constructed additions to old schools, and failed to adjust school enrollments to fit school capacities, in such a way as to intensify racial segregation, they have the affirmative duty 'to seek means to eradicate' the results of their discriminatory acts." Judge Roth found in the Detroit case:

> Between 1950 and 1969 in the tri-county (Detroit metropolitan) area, approximately 13,900 regular classrooms, capable of serving and attracting over 400,000 pupils, were added in school districts which were less than 2 per cent black in their pupil racial composition in the 1970-71 school year. The precise effect of this massive school construction on the racial composition of Detroit area public schools cannot be measured. It is clear, however, that the effect has been substantial.[32]

The Dayton case[33] furnishes an excellent example of the way in which school construction has been used by school boards as a technique to maintain segregation. While keeping their attendance zone lines relatively stable, the Dayton authorities since 1950 opened 22 new schools with enrollments ninety per cent or more white or black and made a large number of additions to school buildings which were attended by either predominantly white or black pupils. In this way they assured whites of a school location until they fled to the suburbs and helped to lock in and further isolate blacks living in the compacted inner city.

Long-range policies effecting desegregation through site selection and building programs have been accomplished through two methods: the appointment by the courts of biracial or multiracial committees to serve as

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[31]*Spangler v. Pasadena City Bd. of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

[32]*Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), at 932, 33.

[33]*Brinkman v. Gilligan*, S.D. Ohio, December, 1972 C.A. 72-137.

advisory bodies to schools boards,[34] and continuing court injunctions against site purchase or construction bids without prior review by the court.

The use of biracial advisory groups for program approval and advice in desegregation has been required more recently under the Emergency School Assistance Program (ESAP) and Title VII of the "Education Amendments of 1972."[35] In building operations, they can make certain the public has a genuine role in decision-making and could easily serve as legal protection to a school board in later years.

School construction injunctions operate in much the same manner. They give all parties to the litigation an opportunity for hearing and review procedures. In Nashville,[36] and as recommended in Detroit by the Roth panel,[37] no new construction can be planned in the open suburban countryside unless it promotes desegregation. In practice, this could mean that a family might move to a new white suburban development only to find there is no space for their children in the public school nearest the development.

Optional Methods

There are a number of voluntary "optional methods" of pupil desegregation. These have seldom proved effective.

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[34]These are most common in southern cases and received momentum from the 5th Circuit Court of Appeals in *Ellis v. Bd. of Public Instruciton of Orange Co., Fla.*, 423 F.2d 203 (5th Cir. 1970). School boards have not been uniformly receptive to the idea of the "free advice."

[35]Public Law 92-318, 92nd Congress (June 23, 1972) 86 Stat. 354-371.

[36]*Kelley v. Metropolitan Board of Education of Nashville*, 463 F.2d 732 (6th Cir. 1972).

[37]The Panel's "Response to the Court's Ruling on Desegregation Cases and Order for Development of Plan of Desegregation," July 29, 1972, *Bradley v. Milliken*, 345 F.Supp 914 (E.D. Mich. 1972).

In fact, in the North they have more often than not served as a form of state-imposed segregation.

Optional Zones

One of the most popular voluntary methods has been the establishment of optional zones situated between school attendance zones where the racial composition of the population is changing. This allows whites access to a white (or whiter) school until they move elsewhere. Judge Roth's Detroit ruling stated: "The natural, probable, forseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably 'black schools'." The plaintiffs in Dayton presented evidence of a number of such zones which appeared to have racial implications. Optional zones have also been set up for religious segregation (Detroit) or simply to allow people with influence to go to school where they wish.

Open Enrollment

For several years after the enactment of the Civil Rights Act of 1964,[38] it was hoped that "open enrollment" or "freedom of choice" desegregation plans would work. At first, quite a few black children chose to attend formerly all-white schools; few, if any, whites chose to cross over to all-black schools. In many districts where no changes were made to accommodate blacks entering majority white schools, the blacks soon decided they were better off in the security of their own premises. For example, in Jacksonville during this period a considerable number of blacks transferred voluntarily from Matthew W. Gilbert to Andrew Jackson High School. Most of them were back at Gilbert before the first semester was over.

By May of 1968, the Supreme Court held in *Green*[39] that where freedom of choice offers real promise of achieving a unitary and nonracial system, there would be

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[38]Public Law 88-352, 88th Congress (July 2, 1964) 78 Stat. 241.

[39]*Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968).

no objection to allowing it to prove itself in operation, but that where other methods which promise speedier and more effective conversion to a unitary system are available, freedom of choice is not acceptable. The *Green* decision, for all practical purposes, ended freedom of choice as a desegregation technique.

Majority to Minority Transfers

A variation of open enrollment was introduced by the courts and HEW to allow any pupil who is a member of the majority race in the school he attended to transfer to a school where he would be in the minority. Thus, a black in a ninety-five per cent black school could transfer to any school where there are fifty per cent or more whites. Some court orders permit the transfer only if space is available in the receiving schools; other transfer orders are in effect regardless of space. Of late, all of them include transportation (furnished free by the board) as an incentive. Where a system has no racially identifiable schools and is truly desegregated, majority to minority transfers have no validity as no schools would be substantially disproportionate from the total system in their racial composition. The technique has never been used by whites except to transfer to a school less black than the one to which they were assigned. It has been used sparingly by blacks. It has never accounted for a significant amount of desegregation.

Magnet Schools

One of the most spurious desegregation techniques is the "magnet school" idea. This was probably given most attention in Detroit where the Detroit Central Board endorsed a plan to offer financial incentives for desegregation to regional boards and local schools and promised superior education to students attending an integraged magnet school.

Although the Detroit Board offered several days of testimony on the past success of the magnet plan and its great potential, the plan would take years to affect a significant number of pupils; the Board could not show where the additional operating "bonus" funds of $30 to

$150 per pupil would come from; the magnet middle schools had not aided desegregation but had served as an escape route for whites assigned to predominantly black schools; and the magnet concept itself set up a new type of dual structure with unequal educational opportunities. If one-fourth or one-half of the schools in a system are developed as magnet schools with above-average expenditures and superior programs, then a dual structure has been established. There is nothing wrong with the idea of making every school an accountable, quality institution — that is what school boards and professional educators are supposed to be about; but in the school desegregation arena the magnet concept is a message to the white community which says in effect: "This is a school that has been made so attractive educationally (magnetized) you will want to enroll your child voluntarily in spite of the fact that he will have to go to school with blacks."

Special Programs

A variety of special programs, even more egregious than the magnet proposals, have been offered by school boards as surrogates for genuine desegregation plans. As a second alternative to a metro plan, the Detroit Board proposed "Special Humanities Schools.[40] Approximately 20,000 white pupils in grades 3-6 of the most segregated schools would have been bused from their base school to special rented buildings two days a week for group activities leading to improved racial understanding and learning performance at an estimated cost of $110 per pupil per year.

Memphis offered a nonplan for desegregation called a "Cultural Exchange Program" which was to be supplemented by a "Personalized Educational Television Program (PET) utilizing modern, space-age

[40]Resolution adopted by the Detroit Central Board Dec. 3, 1971, and submitted to the court as Plan C.

communication technology."[41] The Cultural Exchange Program was approved by the district court in its May, 1969 opinion and again featured in "The Memphis Plan" submitted to the court on November 10, 1971. Ironically, one of the four major elements in this plan was that it "should be free of busing"; yet the Cultural Exchange Program component called for busing pupils around the city extensively for field trips and shared classrooms, assembly, musical, and physical education programs. The exchange program had some merit but not as a substitute for desegregation.

Metropolitan Cooperation

A number of metropolitan areas have instituted voluntary desegregation plans involving the busing of inner city pupils to predominantly white, middle class sections of the city or to suburban schools in other cooperating districts: Hartford (Project Concern), Boston (METCO), Newark-Verona, Rochester, New Haven, and others. These programs have received extensive publicity and have been much studies but have little significance for the problem of urban desegregation. Even if successful, they are little more than pilot programs which offer no realistic solutions for ending racial isolation in the large cities. They do not allow for equal participation by both races in the desegregation process but label inner city pupils "disadvantaged" and "inferior" and their schools "second-class." Furthermore, they are voluntary and it is unlikely that any urban or metropolitan desegregation plan can be effected at this time on a voluntary basis.

Open Housing

The most dilatory voluntary plan for desegregation is to wait for open housing and let the problem take care of itself. This is the most logical long-range solution * * *

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[41]The Memphis Plan, Nov. 10, 1971. The Dallas Schools also used Title IV (Civil Rights Act) funds this past year for desegregation via television.

EXHIBIT 99

EXCERPTS FROM PREFILED WITNESS STATEMENT OF DR. EUGENE TONE, ADMINISTRATIVE ASSISTANT, PUPIL PERSONNEL SERVICES, TACOMA SCHOOL DISTRICT NO. 10

I. BACKGROUND AND RESPONSIBILITIES OF DR. EUGENE TONE

1. I am Dr. Eugene Tone, and I reside at 1201 Berkeley, Fircrest, Washington.

2. For the past eleven years I have been the Administrative Assistant for Pupil Personnel Services for the Tacoma Public Schools. I make all of the following statements from my personal knowledge as the person directly involved in monitoring student mobility and maintaining the racial balance in the Tacoma public schools in accordance with appropriate federal and district guidelines, and from the files, records, and statements of persons whom I supervise in this capacity in the ordinary course of my employment.

3. My educational background is as follows: I obtained a Bachelors of Arts degree in Political Science from the University of Washington in 1956. I obtained a Bachelors of Education degree from the University of Puget Sound in 1958, and a Masters of Education degree from the University of Puget Sound in 1962. I obtained my Doctors of Education degree from Washington State University in 1969.

4. My professional experience in the education field, all with the Tacoma School District, is as follows: I was a junior high school teacher for three years (1958-1961) at Gray Junior High School. I spent two years as high school guidance counselor (1961-1963) at Mount Tahoma High School, and two years as a high school assistant principal (1963-1965) at Mount Tahoma High School. I then spent one year as a principal at Mason Junior High school (1967-1968). For the past eleven years, I have been the

Administrative Assistant for Pupil Personnel for Tacoma Public Schools.

5. As Administrative Assistant for Pupil Personnel Services I am responsible for all the attendance services department, and for liaison with the Pierce County Juvenile Court and the police-school liaison program. I am responsible for the students rights policies, appeals and hearings, and student records management. I am also responsible for community school services, and the G.E.D. testing center. I have some responsibility for guidance and counseling, and for the child abuse and neglect programs of the district. I am involved in the development and operation of an alternative high school for Tacoma public schools. I am charged with the direct administration of the district's optional enrollment program, and with the administration of the central area option (or magnet school) program. I have supervisory responsibilities over attendance counseling, and particularly over the summer counseling program which explains to parents and students the options available under the optional enrollment and the magnet school programs. I have, through attendance services, the responsibility to monitor student mobility, and to monitor racial balance throughout the district. I have, finally, responsibilities to assist in the development of district policies in each of my areas of responsibility. I have worked in each of these areas throughout my eleven year tenure as Administrative Assistant for Pupil Personnel Services.

II. HISTORY OF TACOMA SCHOOL DISTRICT ACTIVITY TO REDUCE RACIAL IMBALANCE IN ITS SCHOOLS.

7. For over a decade the Tacoma School District has allowed students to attend schools other than those geographically closest to their homes for the purpose of preserving an appropriate racial balance in its schools. Through a program of both mandatory actions (school closures, racially controlled enrollment at magnet schools) and voluntary alternatives for students and parents, (op-

tional enrollment, busing, and counseling) the Tacoma School District has, to date, lessened racial imbalance in its schools, according to appropriate guidelines. These programs are consistent with the District's Policy 6000, adopted in 1965, which sets forth basic principles relating to equal educational opportunity for all students in the District. All student enrollment in the Tacoma School District is subject to the District's policies of maintaining a racially balanced school district.

8. In the early 1960's, Tacoma School District personnel and community leaders realized that housing patterns and other factors had led to relatively high concentrations of racial minorities at certain of the Tacoma School District's school facilities, primarily in Tacoma's central area. (Admitted by Defendants; Finding ____).

9. Between 1963 and 1965, the Tacoma School District studied the racial balance in the Tacoma School District, and received comment from various community groups and task forces, designed to develop proposals to reduce any racial imbalance in the Tacoma schools. (Admitted by Defendants; Finding ____).

10. In 1964, an examination of the ethnic composition of student populations in the Tacoma Public Schools disclosed that two elementary schools (McCarver Elementary School and Stanley Elementary School) and one junior high school (McCarver Junior High School) had non-white populations in excess of 50% of the school population. Exhibit T-1 is a true copy of the 1964 ethnic composition survey.

11. In 1965, the Tacoma School District adopted Policy 6000. In this policy the School Board set broad policy standards designed to promote equal educational opportunities for all students in the Tacoma School District. Exhibit T-2 is a true copy of Policy 6000. (Admitted by Defendants; Finding ____).

12. In July 1966, recognizing the continuing racial imbalance at several central area schools, the Tacoma School Board adopted a voluntary optional enrollment policy for students attending McCarver Junior High

School, a central area facility experiencing minority enrollment exceeding 50% of the school population. Exhibit T-3 is a true copy of that policy. Students who resided in the attendance area for McCarver Junior High School were given the opportunity to choose to attend other junior high schools in the district. In addition, students at other junior high schools were given an opportunity to attend McCarver Junior High School, provided that such attendance would reduce the degree of perceived racial imbalance existing at McCarver. The School District provided additional special bus transportation for students participating in the optional enrollment program. (Admitted by Defendants; Finding ____).

13. In June 1967, the voluntary optional enrollment program was expanded to central area elementary schools (McCarver, Stanley, Central and Bryant Elementary Schools), wherein students residing in the attendance areas for those schools were given an opportunity to attend any elementary school in the Tacoma School District. Exhibit T-4 is a true copy of the policy statement enacting this program. In addition, optional enrollment opportunities were extended to students attending elementary schools outside the central area to attend these central area elementary schools if transfer into the schools would result in a more heterogeneous student body. (Admitted by Defendants; Finding ____).

14. In October 1967, minority enrollment at McCarver Elementary School, Stanley Elementary School, and McCarver Junior High School was in excess of 50% of the total student population of those schools. Exhibit T-5 is a true copy of the October 2, 1967 ethnic composition survey.

15. In April 1968, the Tacoma School Board adopted major changes designed to ease the perceived racial imbalance in Tacoma schools. The major changes included:

> (1) Closure of McCarver Junior High School as a junior high school, and transfer of all junior high school students attending McCarver to junior high schools throughout the district.

(2) Establishment of an exemplary elementary school ("magnet school") at the McCarver Junior High School facility, with admission open to students throughout the district by voluntary application only, and with student attendance controlled by the district to preserve an appropriate racial balance;

(3) Closure of Central Elementary School;

(4) Transfer of all sixth graders at Stanley Elementary School to other elementary schools throughout the district;

(5) Reaffirmation of the district's position that no high school in the Tacoma School District will be allowed to become *de facto* segregated.

Exhibit T-6 is a true copy of the district policy implementing these changes.

16. Following this school district action, McCarver Elementary School went from an 87 percent black population in 1967 to a 53 percent black population in 1969. Exhibit T-7 is a true copy of the ethnic composition survey dated October 2, 1969.

17. In May 1970, the Tacoma School Board adopted policies specifically committing the district to elimination of racial imbalance to levels within the State Board of Education guidelines, and establishing a technologically advanced elementary school ("magnet school") at Stanley Elementary, with an admission program similar to that existing at McCarver Elementary. Exhibit T-8 is a true copy of the School Board policy adopting this program.

18. By September 1971, elimination of board-defined racial imbalance at McCarver Elementary School had been completed, according to the ethnic composition survey dated October 2, 1971. Exhibit T-9 is a true copy of the October 2, 1971 ethnic composition survey. (Admitted by Defendants; Finding ——).

19. By September 1972, no school in the Tacoma School District had minority enrollment in excess of 50% of total student enrollment except Hawthorne School. Exhibit T-10 is a true copy of the ethnic composition survey dated October 2, 1972.

20. Hawthorne School had, since 1968, housed much

of the District's Headstart and Follow-Through programs, which added sufficient numbers of students to justify an otherwise inefficiently low general enrollment at the school. Those programs continued into the 1973-74 school year, when they were all finally moved to other District facilities. The Hawthorne building was, even in 1972, a substandard structure, and Health Department and Fire Department authorities had raised serious questions about the desirability of Hawthorne continuing to serve children, and particularly young children, because of earthquake damage and structural and other defects sustained by the Hawthorne building. After the District removed its programs from Hawthorne, it leased the facility to the Puyallup Indian Tribe.

21. In November 1972, the Board adopted a limited voluntary optional enrollment program for high school students, allowing high school students to attend, with certain qualifications, the school of their choice. Exhibit T-11 is a true copy of that policy. (Admitted by Defendants; Finding ____).

22. In February, 1974, the Tacoma School Board extended the voluntary optional enrollment program, with certain qualifications, to all grade levels throughout the District. Exhibit T-12 is a true copy of the policy expanding that program. (Admitted by Defendants; Finding ____).

III. CURRENT OPERATION OF TACOMA SCHOOL DISTRICT "MAGNET SCHOOL" AND "OPTIONAL ENROLLMENT" PROGRAMS

23. The Tacoma School District currently operates educationally enhanced (magnet school) programs at McCarver Elementary School and Stanley Elementary School. Both are located in the Tacoma central area. Those elementary schools are now operated as district-wide elementary schools, with attendance selections made solely by application. Students are accepted in those schools according to the number of positions available at the school, and according to the racial balance at the

schools to comply with Tacoma School District and federal racial balance guidelines. (Admitted by Defendants; Finding ____).

24. As a part of the magnet school programs at McCarver and Stanley Elementary Schools, attendance at those schools is controlled by the District to maintain desired racial balance within the District, and federal guidelines. At the initiation of the Tacoma School District magnet school program in 1968-1970 some students living in the geographic attendance areas immediately surrounding McCarver and Stanley Elementary Schools were denied enrollment at those schools because their attendance would disrupt the racial balance. Thus, students, and particularly black students, whose attendance would have disrupted the desired level of racial balance at Stanley and McCarver were assigned to other elementary schools throughout the Tacoma School District. At present, changes in housing patterns, optional enrollment, busing and counseling has allowed all students residing in the McCarver Elementary School geographic attendance area to attend that school if they wish without creating a racially imbalanced school. However, at present 70 students from the Stanley attendance area are being denied admission to Stanley Elementary School. (Admitted by Defendants; Finding ____).

25. The optional enrollment program operated by the Tacoma School District allows students to attend any school within the Tacoma School District, except Stanley and McCarver Elementary Schools, whose attendance is controlled by the District through voluntary applications. To assist students' and parents' decisions concerning optional enrollment, the District has operated an extensive summer counseling program, to counsel parents and students concerning the availability of educational opportunities at schools other than those nearest the homes of the students. (Admitted by Defendants; Finding ____).

26. Public transportation is an element of both the magnet school and the optional enrollment programs.

Transportation is funded by the District, though transportation services are actually delivered by the Tacoma Transit System. District and transit personnel examine the busing patterns yearly, comparing bus routes with the results of the summer counseling programs, to meet the needs of students participating in the magnet school and the optional enrollment programs. Busing patterns are currently designed to provide bus transportation within two blocks of the student's home, to and from the school of his choice. Currently, approximately 1,394 students elementary school bus into and out of the Tacoma central area as a part of the magnet school program. Approximately 1,200 additional students annually participate in the optional enrollment program, and many of those students use bus transportation to travel from their homes to their school. Of the approximately 1,394 students busing in and out of the Tacoma central area to schools throughout the District, approximately 444 are elementary school children who reside in geographic areas in which either McCarver or Stanley are their nearest elementary schools. For most of those students, McCarver or Stanley is also their next-nearest school.

IV. EFFECT OF INITIATIVE 350 ON TACOMA SCHOOL DISTRICT.

A. EFFECT ON MAGNET SCHOOLS — STANLEY ELEMENTARY

27. At present, only those students on the Stanley Elementary waiting list who reside in the geographic area where Stanley is their nearest school are prevented by the district from attending their nearest school. Those students involuntarily attend schools other than their nearest school as part of the magnet school program. Of those students, approximately 53% are minority students. Exhibit T-13 shows the ethnic composition of the students on the Stanley waiting list who reside in the Stanley enrollment area.

28. If the Tacoma School District could not require the students on the Stanley waiting list to attend schools

other than Stanley the minority enrollment at Stanley (assuming that there is sufficient room for the students to attend Stanley) would be 49%. If the District assigned those students to McCarver (assuming McCarver is their next-nearest school) minority enrollment at McCarver (assuming that there is sufficient room for the students to attend McCarver) would be 42.3%. Exhibit T-13 shows the ethnic composition survey for Stanley and McCarver as presently exists.

29. Stanley Elementary School is located in an area of Tacoma with high residential concentrations of minority persons. Exhibit T-13 shows ethnic composition of all students in the Stanley and McCarver geographic attendance area.

30. If the Tacoma School District cannot require students residing nearest Stanley Elementary School to attend schools other than Stanley or McCarver because their attendance would disrupt the racial balance at those schools most Stanley area students currently attending schools outside the Stanley geographic areas may continue to do so. However, most new Stanley area students starting school, and most new students moving into the Stanley attendance area will choose to attend the school nearest their residence.

31. Because analysis of the ethnic composition survey at Stanley Elementary shows that the school will be near 50% minority enrollment if the District allowed the students on the waiting list to enroll, and because the geographic area nearest Stanley is predominately minority and will probably continue to be predominately minority in the future, the effect on Stanley Elementary School of limiting the District's ability to require students to attend schools other than their nearest or next-nearest school may be to increase minority enrollment at Stanley and, thus, increase racial imbalance.

32. Exhibit T-14 is a copy of a survey chart showing the historical growth of minority enrollment in the Tacoma School District. Much of the growth in minority enrollment has occurred due to increased minority

residence in the McCarver and Stanley attendance areas.

B. EFFECT ON MAGNET SCHOOLS — McCARVER ELEMENTARY

33. Although Tacoma School District programs currently keep McCarver Elementary from becoming racially imbalanced according to the pertinent guidelines, enrollment at McCarver is near racial imbalance under those guidelines. Exhibit T-13 shows the ethnic composition of current enrollment at McCarver Elementary. If the 70 students on the Stanley waiting list were assigned to McCarver, McCarver would have even greater minority enrollment.

34. Like the Stanley geographic attendance area, McCarver is located in an area of Tacoma with high residential concentrations of minority persons. Exhibit T-13 shows the ethnic composition of all students residing in the McCarver attendance area.

35. Although most McCarver area students currently attending schools outside the McCarver attendance area may continue to do so, most new McCarver area students starting school, and most new students moving into the McCarver attendance area will choose to attend the school nearest their residence.

36. Because analysis of the ethnic composition survey at McCarver indicates minority enrollment near racial imbalance under appropriate guidelines, and because the McCarver geographic attendance area is predominately minority and will probably continue to be predominately minority in the future, the effect of limiting the District's ability to require students to attend schools other than their nearest or next-nearest schools on McCarver Elementary School may be to increase minority enrollment at McCarver and, thus, to cause racial imbalance under the guidelines in the near future.

C. EFFECT ON STANLEY AND McCARVER — COMPUTER ANALYSIS

37. After voter approval of Initiative 350, and after initiation of this lawsuit, the Tacoma School District, and

particularly those of us in Pupil Personnel, became interested in the impact of the Initiative on assignment of students in the Tacoma central area, which we defined as the geographic area immediately surrounding Stanley, McCarver and Bryant Elementary Schools. We were particularly interested in the impact of the following language of the initiative:

> * * * no * * * school district * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * * and which offers the course of study pursued by such student * * *

38. For most of the students residing nearest McCarver and Stanley elementary schools, McCarver and Stanley are the nearest and next-nearest schools. Because both schools are at or near specified racial balance limits, we perceive little flexibility to adjust racial composition at, for example, Stanley by assigning students whose nearest school is Stanley to attend their next nearest school, McCarver. Given the ethnic composition of the Stanley and McCarver attendance areas, both schools appear destined to become racially imbalanced unless mandatory assignment to schools outside the nearest/next-nearest categories is permitted. We therefore sought to test, by computer analysis, whether, through the assignment of students residing in the Stanley, McCarver and Bryant geographic areas to their nearest and next-nearest schools, the District could eliminate racial imbalance at those schools. In a meeting on March 15, 1979, after discussions with District personnel and the attorneys for the Tacoma School District, Superintendent Alex Sergienko authorized me to proceed with such a study.

39. The goal of our study was to use the nearest/next-nearest criteria to assign as many white students to the central area schools from outlying schools as possible, and to assign as many minority students to the outlying schools from the central area schools as possible.

40. To perform this study, we utilized computer-

stored enrollment information obtained from the student data files compiled October, 1978. That information is continuously updated with revised data showing student mobility. The information contains, among other data, the student's name, ethnic background, street address and grade level, for all of the approximately 15,680 elementary school students in the Tacoma School District.

41. We sent the tapes containing this basic information to Tacoma City Light. Tacoma City Light maintains a computer program called "add. match" which matches city street addresses with city plots. By applying the students' computer information to this program, City Light calculated the distance from the plot of the students' residence to their nearest and next-nearest schools, in distances of feet and tenths of miles. From this information, we extracted the information we needed to perform our computer study of student assignments using the nearest/next-nearest criterion.

42. Exhibit T-16 is a computer printout showing the sequential steps of our study, and the results. The pages of the printout have been numbered in the lower righthand corner, page one through twenty-one, for convenience of reference.

43. Page one of the computer analysis shows the ethnic composition of McCarver Elementary School if the district assigned all students residing nearest McCarver to that school. The "column total" at the bottom of the table shows the number students of each ethnic group, and the total percentage of such groups to total enrollment. There are, for example, 106 caucasian students (25.4%), and total combined minority enrollment of 311 minority students (74.6%). The table on page one also shows students' next-nearest school. There is, therefore, one student whose nearest school is McCarver and whose next-nearest school is Bryant; 337 students whose nearest school is McCarver and whose next-nearest school is Stanley; and 79 students whose nearest school is McCarver and whose next-nearest school is Willard.

44. Page 2 provides similar information concerning

the students residing nearest Stanley Elementary School. Thus, 107 students (24.4%) of the students residing nearest Stanley are caucasian. The remaining 75.6% of the students are ethnic minority students. In addition, 175 students whose nearest school is Stanley have Bryant as their next-nearest school; 45 have Franklin as their next-nearest school; 211 have McCarver at their next-nearest school; and 7 have Reed as their next-nearest school.

45. Page 3 provides similar information for Bryant Elementary School. Caucasian enrollment would be 336 students (64.7%). The remaining 35.3% of the students are minority students. Next-nearest schools are Franklin (44 students), Grant (275 students), Lowell (32 students), McCarver (5 students) and Stanley (163 students).

46. Page 4 summarizes the ethnic composition of students residing nearest to Bryant, McCarver and Stanley Elementary Schools. The "columns totals" indicate that 40% of all students residing nearest those central area facilities schools are caucasians, and 60% of those students are ethnic minorities.

47. To obtain the table shown on page 5, we asked the computer to assign all caucasian students whose next-nearest school is McCarver into McCarver. In this way, we obtained the maximum number of caucasian students who reside nearest or next-nearest McCarver as students at McCarver. The "column totals" show that as a result of such an assignment, we have increased the caucasian enrollment at McCarver from 106 students (25.4%) to 173 students (35.7%).

48. To obtain page 6, we instructed the computer to reduce the number of minority students at McCarver so that total minority enrollment equalled caucasian enrollment, by assigning minority students whose nearest school is McCarver to their next-nearest schools. Because we perceived that we would experience large minority enrollment at Stanley, we assigned minority students from McCarver to Stanley only if we could not assign such students to any other schools. The resulting "column totals" therefore show caucasian enrollment of 173 students

(50%) and combined minority enrollment of 173 students (50%).

49. Pages 7 and 8 show the schools to which the minority students were assigned, to obtain the results shown on page 6. Thus, 75 minority students whose nearest school was McCarver were assigned to Stanley (page 7), and 63 minority students whose nearest school is McCarver were assigned to Willard (page 8).

50. Page 9 shows the ethnic composition at Stanley Elementary School after the assignments made in the previous steps. The number of caucasian students, therefore, has been reduced to 57 students (12.3%). Minority enrollments has increased to 406 students (87.6%). The left hand column shows the next-nearest school for those assigned to Stanley. The bottom row, denominated "Stanley" shows those students whose nearest school was McCarver and who were assigned to Stanley as their next-nearest school.

51. To obtain the table shown on page 11, we instructed the computer to assign to Stanley as many caucasian students whose next-nearest school is Stanley (except those whose nearest school is McCarver) as possible. By doing this, we increased the total number of caucasian students attending Stanley to 229 students (36.1%). Page 10 shows the total ethnic composition of students at Stanley after performing this assignment. The left hand column of the table on page 12 shows the nearest school of those students assigned to Stanley in the previous steps.

52. We next instructed the computer to assign as many minority students attending Stanley as possible to their next-nearest school, and obtained the table shown on page 17. The column totals indicate that 229 caucasian students (49.2%) remain at Stanley. Total combined minority enrollment is 236 students (50.8%). The table on page 17 also shows the next-nearest school of all students attending Stanley. The table on page 16 shows the nearest school of all students attending Stanley after these assignments. Pages 13 through 15 show the number and ethnic

composition of the minority students assigned from Stanley to their next-nearest school: Reed (4 students); Franklin (34 students); Bryant (132 students). Pages 18 through 20 provide similar information.

53. Page 21 shows the ethnic composition of Bryant Elementary School after performing the assignments set out above. Caucasian enrollment at Bryant is now 240 students (43.2%), with total combined minority enrollment of 315 students (56.8%). The table on page 22 shows ethnic composition at Bryant, and also shows the next-nearest school of those students attending Bryant.

54. We next instructed the computer to assign as many minority students whose school is Bryant as possible to their next-nearest school (except those whose next-nearest schools were McCarver or Stanley). The first line of the table on page 23 shows the ethnic composition of Bryant after performing that assignment. Caucasian enrollment at Bryant would be 240 students (54.1%) after that assignment.

55. The table on page 23 summarizes the ethnic composition of students at Bryant, McCarver, and Stanley Elementary Schools after the District makes assignments using the nearest/next-nearest criteria to attempt to reduce minority enrollment to 50% or less in each of those schools.

56. The following statements briefly summarize the results of the computer study:

57. Assuming that all voluntary or optional enrollment and magnet school programs currently operated by the Tacoma School District were eliminated, if all students living nearest McCarver Elementary School attended that school, minority enrollment at McCarver would be 74.6%. If all students living nearest Stanley Elementary School attended that school, minority enrollment at Stanley would be 75.6%. Those schools would be racially imbalanced, according to district and federal guidelines.

58. If all non-minority students whose next-nearest school was McCarver were assigned to McCarver, and if a

sufficient number of minority students whose nearest school is McCarver were assigned to their next-nearest school, so that minority enrollment equaled non-minority enrollment, McCarver Elementary School would be racially balanced according to District and federal guidelines. Total enrollment at McCarver, however, would be 346 students, which is 36 per cent less than its current enrollment which is its optimum enrollment for educationally and economically efficient operation.

59. After the student assigments described in 58 above were made, minority enrollment at Stanley Elementary School would by 87.7%. If all non-minority students whose next-nearest school was Stanley (except those whose nearest school is McCarver) were assigned to Stanley, and if *all* minority students whose nearest school was Stanley were assigned to their next-nearest school (except those whose next-nearest school is McCarver), minority enrollment at Stanley would be 50.8%. Stanley Elementary School would remain racially imbalanced according to district and federal guidelines. Total enrollment at Stanley in addition, would be 465 students, which is 25.5 per cent less than its current enrollment, which is its optimum enrollment for educationally and economically efficient operation.

60. After the student assignments described in 58 and 59 above were made, minority enrollment at Bryant Elementary School would be 56.8%. If all minority students whose nearest school is Bryant (except those whose next-nearest schools are Stanley or McCarver) were assigned to their next-nearest schools, minority enrollment at Bryant would be 45.9%. Bryant Elementary School would be racially balanced according to district and federal guidelines.

61. Assuming that none of the programs currently operated by the Tacoma School District to adjust racial balance in Tacoma Public Schools were continued, and assuming that students at McCarver, Stanley, and Bryant elementary schools were assigned to only their nearest or next-nearest schools, the Tacoma School District could not

adjust student enrollment by assignments of students to prevent Stanley Elementary School from being racially imbalanced according to district and federal guidelines.

V. OVERALL EFFECT OF IMPOSING THE "NEAREST/NEXT-NEAREST" CRITERIA UPON TACOMA SCHOOL DISTRICT ENROLLMENT POLICIES.

Based upon my experience as Administrative Assistant for Pupil Personnel Services, and upon information made available to me by those attendance counselors who work with me and under my supervision, and based upon the information and exhibits discussed above, I draw the following observations, conclusions and opinions:

A. THE TACOMA SCHOOL DISTRICT CANNOT MAINTAIN RACIAL BALANCE IN McCARVER AND STANLEY ELEMENTARY SCHOOLS IF IT CANNOT REQUIRE STUDENTS TO ATTEND SCHOOLS OTHER THAN THEIR NEAREST OR NEXT-NEAREST SCHOOLS.

62. My experiences with counseling parents and students concerning alternatives in optional enrollment is Tacoma schools indicate the parents overwhelmingly prefer to have their children attend the school nearest their residence. This preference is particularly strong for parents of children in grades kindergarten through third grade. Because we control enrollment at Stanley and McCarver to maintain appropriate racial balances at those schools, we are able to tell parents that their children must attend schools outside the Stanley and McCarver area. Parents reluctantly accept that policy.

63. If we could not require parents to send their children to schools other than their nearest school, a significant number of parents would respond by seeking to have their children enrolled in their nearest school. Based upon my experience, I would estimate that 25% of the students residing nearest McCarver and Stanley but attending schools other than those schools would return to

McCarver and Stanley, if given the opportunity to do so, within the first year they have that opportunity. Within 3 or 4 years, I believe 40-50% of such children would return.

64. It is also my experience that the parents of new students, including those first entering school and those transferring into a new residential area, prefer to have their children attend the school nearest their home.

65. The computer study discussed above shows that if those students *currently* residing in Tacoma's central area were assigned by the district to their next-nearest schools in an attempt to eliminate racial imbalance at McCarver, Stanley and Bryant Elementary Schools, Stanley would still have minority enrollment in excess of 50% of total enrollment.

66. Given the racial composition of the residential neighborhoods for which Stanley and McCarver are the nearest and next-nearest schools, and the attitudes of parents who prefer that their children attend their nearest school, and the overall trend of growing minority enrollment in Tacoma schools, and all the data and information available to me, it is my opinion that the Tacoma School District cannot maintain an appropriate racial balance in McCarver and Stanley Elementary Schools if it cannot require students to attend schools other than their nearest or next-nearest schools. Although McCarver and Stanley may not become racially imbalanced in the first year a nearest/next-nearest policy is imposed, I believe minority enrollment in these schools would become progressively greater, and that racial imbalance would exist within 2 years.

B. THE TACOMA SCHOOL DISTRICT CANNOT MAINTAIN EFFECTIVE MAGNET SCHOOLS AT McCARVER AND STANLEY UNLESS THOSE SCHOOLS ARE RACIALLY BALANCED

67. The magnet school programs at Stanley and McCarver control racial balances at those schools because we are able to attract sufficient numbers of non-minority students from outside the central area to those schools. This

increased caucasian enrollment, when coupled with our ability to require minority students residing near McCarver and Stanley to attend schools outside the central area, allows us to maintain an appropriate racial balance at those schools.

68. Based upon the results of our counseling program, and the input received by me from parents and counselors, caucasian students will attend educationally enhanced "magnet" schools (such as McCarver and Stanley) if those schools are racially balanced. Sufficient numbers of caucasian students residing outside the central area will not, however, attend those schools if they are racially imbalanced.

69. McCarver and Stanley are racially balanced, at least in part, because we can require students residing near those schools to attend other schools.

70. If we could not require students to attend schools other than their nearest or next-nearest schools, McCarver and Stanley would experience increased minority enrollment almost immediately, and progressively greater minority enrollment over the next few years. As minority enrollment nears racial imbalance, the number of caucasian students from outside the McCarver and Stanley areas attracted to the magnet school programs at those schools would decrease, and the percentage increase in minority enrollment would therefore accelerate.

71. The magnet school concept is based upon the ability to attract some students away from their nearest school and into the magnet school. If McCarver and Stanley experience increased minority enrollment and racial imbalance, we will not be able to attract caucasian students, and the magnet program will fail to assist in maintaining racial balance at McCarver and Stanley.

C. THE TACOMA SCHOOL DISTRICT FACES SERIOUS PUBLIC OPPOSITION IF IT ATTEMPTS TO CONTROL RACIAL IMBALANCE BY ASSIGNING STUDENTS TO THEIR NEXT-NEAREST SCHOOLS.

72. Based upon my experience, the Tacoma School

District's programs to eliminate racial imbalance in the schools have been successful, at least in part, because there has not been widespread or violent public opposition to the programs.

73. I believe the reason that the public has accepted the Tacoma School District programs is that, to a large extent, the programs have progressively *expanded* the attendance options available to parents and students, and that the element of free choice has been injected into the attendance programs. Even prior to adoption of the optional enrollment program, the district has maintained a policy of allowing students to transfer to any school pursuant to a "special purpose transfer" if the students or parents felt entrapped by their residential or educational situation. The optional enrollment policies contributed additional choice alternatives into parents' and students' enrollment decision. Even under the magnet school program where students residing near McCarver and Stanley are required to attend other schools, such students may choose any school in the district (except Stanley) and are provided transportation to attend those schools. Our discussions with parents and students indicate that "choice" and "options" are now key parts of parents' understanding and perceptions of their "rights" to education in Tacoma public schools. Through the optional programs, no student is "assigned" to a school against their will, although a few students are denied attendance at the school they first select.

74. If the District cannot control racial balance by assigning students to schools other than those nearest or next-nearest their homes, the Tacoma School District will have to specifically assign students to their next-nearest schools, in order to attempt to achieve racial balance in its schools. The element of "choice" inherent in the current enrollment policies of the District will be removed. Because we would be limiting or removing parents' perceived "rights," it is my opinion that the district faces significant opposition to implementation of a policy of mandatory assignment to next-nearest schools.

D. A MANDATORY ASSIGNMENT POLICY WILL RESULT IN FEWER STUDENTS ATTENDING THEIR "NEIGHBORHOOD SCHOOLS" THAN EXISTS UNDER PRESENT POLICIES.

75. From my experiences counseling parents in the magnet school and optional enrollment policy, I have learned that parents perceive their "neighborhood school" to be the school nearest their home. When we deny parents' application to have their children attend their nearest schools (i.e., Stanley), parents usually do not care whether the school their children attend is their next-nearest school or a school across town, if the District provides convenient and efficient bus transportation.

76. If the Tacoma School District cannot require students to attend schools other than those nearest or next-nearest the students' homes, we will have to assign considerable numbers of students to their next-nearest schools, in order to maintain appropriate racial balances at the schools.

77. McCarver and Stanley Elementary Schools currently comply with appropriate racial balance guidelines in part because 444 students who reside in the McCarver and Stanley attendance areas attend schools outside those areas under the optional enrollment and magnet school programs. (Exhibit T-13). According to the computer study discussed above, if the Tacoma School District was to attempt to comply with the same racial balance guidelines by the mandatory assignment of students to their next-nearest schools, 658 students would be assigned, and the student populations of the following schools would be affected: McCarver, Stanley, Bryant, Willard, Franklin, Reed, Grant and Lowell Elementary Schools. The District would therefore "move" 48% more students than move under existing programs *without* achieving the goal of racial balance at Stanley.

78. Under present policies, no students are involuntarily *assigned* to any school, and only approximately 70 students (i.e., those on the Stanley waiting list)

are denied access to the school of their first choice. All other children not attending their nearest school do so voluntarily under the optional enrollment program.

79. If the district adopted a policy of mandatory assignment to next-nearest schools in order to attempt to avoid or reduce racial imbalance in the schools, fewer students would be attending the school nearest their home than are presently doing so under policies of the Tacoma School District. Given parents' perception that "neighborhood school" means the school nearest their home, fewer students would be attending "neighborhood schools" under the nearest/next-nearest policy than presently do so.

E. THE TACOMA SCHOOL DISTRICT CANNOT PREVENT RACIAL IMBALANCE IN OTHER SCHOOLS THROUGH SOLELY VOLUNTARY PROGRAMS. RESTRICTION ON ITS ABILITY TO PREVENT STUDENTS FROM ATTENDING THEIR NEAREST OR NEXT-NEAREST SCHOOLS WILL MAKE IT DIFFICULT OR IMPOSSIBLE TO MAINTAIN RACIAL BALANCES IN OTHER TACOMA SCHOOLS.

80. Although counseling and voluntary transportation within the optional enrollment program currently eliminates racial imbalance in other Tacoma School District facilities, at least four elementary schools (Roosevelt, Bryant, Lister, and Rogers Elementary Schools) and two junior high schools (Gault and McIlvaigh) have minority enrollment near enough to federal and district racial guideline limits to pose substantial danger of failure to comply with those guidelines in the future without the use of involuntary assignment to schools outside the nearest/next-nearest categories. Exhibit T-15 is a true copy of the current ethnic composition surveys for all Tacoma schools.

81. Given the trend of increasing minority enrollment in the Tacoma School District, we project increasing difficulty in keeping the schools listed above within appropri-

ate racial balance guidelines through use of the voluntary programs now extant.

82. In my opinion, the Tacoma School District must immediately begin to plan and develop programs designed to reduce the growing minority enrollment in the schools listed above, to prevent those schools from becoming racially imbalanced.

83. Restrictions on the Tacoma School District's ability to require students to attend schools other than those nearest or next-nearest their homes will inhibit the districts' ability to develop enrollment policies sensitive to the individual desires and needs of parents and students, and will instead require mandatory assignments and dislocations of students to their next-nearest schools.

VI. CONCLUSIONS

84. Without the magnet school and optional enrollment programs, the Tacoma School District faces a substantial probability that it could not maintain racial balance at present levels in the future.

85. If Initiative 350 prevents the Tacoma School District from assigning students to schools other than those nearest or next-nearest their place of residence, the Tacoma School District cannot keep its schools racially balanced according to district and federal guidelines.

86. The impact of prohibiting the Tacoma School District from assigning students to schools other than those nearest or next-nearest the students' home would be the loss of the District's successfully balanced multi-racial school system, and violation of the fundamental public policy favoring maintenance of a multi-racially balanced educational experience for students in Tacoma.

(Continued From Inside Front Cover)

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NO. 81-9

IN THE

Supreme Court of the United States

JANUARY TERM 1981

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees,

v.

STATE OF WASHINGTON, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
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MOTION TO DISMISS OR AFFIRM
OF AMERICAN CIVIL LIBERTIES UNION, et al.,
(SEATTLE INTERVENOR PLAINTIFFS)
and
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IN THE
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JANUARY TERM 1981

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
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v.

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EAST PASCO NEIGHBORING COUNCIL, et al.,
(PASCO INTERVENOR PLAINTIFFS)

JOINDER OF MOTION WITH MOTION OF
SCHOOL DISTRICT APPELLEES

The Seattle intervenor plaintiffs and the Pasco intervenor plaintiffs[1] join the school district appellees[2] in moving the

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[1] A complete list of these intervenor plaintiffs is set out in footnote 2 of the Jurisdictional Statement of the State of Washington.

[2] A complete list of the school district appellees and the individual plaintiffs joined with them throughout this litigation is found at Appendix D of the state's Jurisdictional Statement.

Court to dismiss the appeal of the State of Washington and CiVIC for failure to present any substantial federal question. The Seattle and Pasco intervenor plaintiffs/ appellees adopt the statement in the Motion to Dismiss or Affirm of the school district appellees with respect to the issues presented, the nature of the case, and the basic argument in support of the motion.

The statute declared unconstitutional by the lower courts is nothing more or less than a racial classification for which a compelling state interest is neither claimed nor exists. While wishing not to belabor the thorough analyses in the decisions of the lower courts and the brief of the school district appellees, these appellees do wish to comment upon a few aspects of the matter before the Court.

The state argues at page 19 of its Jurisdictional Statement that Initiative

350 "[r]eflects the [n]ational [n]eighborhood [s]chool [p]olicy [a]dopted by Congress", citing the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701, et seq.). However, The state's argument ignores the provisions of that same federal statute which explicitly obligate any school district which has formerly practiced deliberate segregation to take affirmative steps to desegregate, and authorize all federal courts, departments, and agencies to approve any desegregation plan going beyond that which federal agencies could compel, if the plan is voluntarily proposed by local school authorities.[3] That legislation clearly shows that national policy is one of encouraging local school authorities to desegregate so as to avoid recourse to the

---

[3]The pertinent provisions of the Equal Educational Opportunity Act of 1974 are:

federal courts. It is Initiative 350 and not the decisions of the courts below that is in conflict with basic national policy, by prohibiting local school boards from adopting voluntary desegregation plans, even where the existing segregation may be

(footnote cont.)

> 20 U.S.C.§ 1703(b). Denial of equal educational opportunities prohibited
>
> . . . .
>
> (6) The failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this subchapter, to remove the vestiges of a dual school system.
>
> 20 USC § 1716. Voluntary adoption of remedies
>
> Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency.

the result of deliberate past actions of such local authorities.

The proponents of Initiative 350 claim that they have no quarrel with the goal of desegregating the public schools. They have, they say, only a difference of opinion with the Seattle School Board over what methods should be used. This claim rings hollow in light of the district court's unchallenged finding that it would be impossible to effect racial balance in Seattle's schools without using some or all of the tools prohibited by Initative 350. Finding of Fact 8.5.

When Initiative 350 was scheduled to take effect,[4] thousands of students in the appellee school district were already attending schools that had achieved a measure of racial balance. No error was

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[4] The effective date of Initiative 350 was December 7, 1978 [Finding of Fact 7.26], well into the first year of implementation of The Seattle Plan.

or could seriously have been assigned to the district court's finding that implementation of Initiative 350 would result in increasing racial imbalance in the public schools in these districts. Finding of Fact 8.1. When these two factual propositions are considered together, the reality is that under Initiative 350 those same thousands of individual students who are now attending desegregated schools would be likely to return to the segregated schools they would have attended but for the adoption of The Seattle Plan.

The integrated public schools in the appellees' school districts are functioning peacefully, smoothly, and effectively. The Seattle Plan stands as an example of the immense benefits of a local solution to this most complex social issue. It would be tragic in the extreme if opponents of The Seattle Plan could abort that plan by legislation that could result in a

desegration plan imposed by the district court after trial on the issue of past intentional discrimination by predecessor school boards.

If Initiative 350 were held to be constitutional, this Court would have provided a blueprint for the systematic reversal of any past program or action taken for the benefit of a racial minority, with the exception of a program or action resulting from a court order. The formula would be simple: restructure the political process to remove the authority of the person or entity which had adopted the program or action, using superficially "race neutral" language. Under such a blueprint, it would even be permissible to admit that the legislation removing the authority was enacted for the purpose of depriving a racial minority of a benefit previously secured for it.

A restructing of the political process such as that attempted to be accomplished by Initiative 350 is precisely the evil which this court perceived in Hunter v. Erickson, 393 U.S. 385 (1969). While the form of Initiative 350 may be slightly more subtle than the Akron City Charter amendment struck down in Hunter, supra, the effect is every bit as pernicious.

The appellants having failed to raise a sbstantial federal question, this appeal should be dismissed or the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated this 24th day of July, 1981.

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ON APPEAL FROM THE UNITED STATES
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MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does a state statute which requires student assignment to the nearest or next-nearest school establish an impermissible racial classification where it contains exceptions for all common forms of nonneighborhood student assignment but racial desegregation, contains specific prohibitions against all major techniques of desegregation, and was enacted in order to terminate a well-publicized local school district's voluntarily adopted desegregation program?

2. Is the finding by the United States District Court for the Western District of Washington--that a racially discriminatory purpose was one of the factors which motivated the adoption of Initiative 350--supported by substantial evidence?

3. May a state prohibit all local school districts from adopting or continuing desegregation programs which include assignment of students to nonneighborhood schools?

4. Does protection of the constitutional rights of schoolchildren by school districts, school board members and individual private litigants constitute a "special circumstance" which would render an award of attorneys' fees unjust?*

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*A complete list of intervenor plaintiffs is set out in footnote 2 of the Jurisdictional Statement of the State of Washington. A complete list of the School District Appellees and the individual plaintiffs joined with them throughout this litigation is found at Appendix D of the state's Jurisdictional Statement.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees,

v.

STATE OF WASHINGTON, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

MOTION

The Appellee School Districts[1] respectfully move to dismiss the State of Washington's ("State") appeal or, in the

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[1] The parties filing this motion are the original plaintiffs in the district court. They include (a) Seattle School District No. 1 of King County, Washington; (b) Tacoma School District No. 10 of Pierce County, Washington; (c) Pasco School District No. 1 of Franklin County, Washington; (d) the Board of Directors of Seattle School District No. 1; (e) named individual

alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. Sup. Ct. R. 16.1(c) and (d).

The jurisdictional statement filed by the State sets forth most of the statutes involved in this case. Also pertinent are 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI, 1964 Civil Rights Act), set forth in the Appendix hereto.

The State's presentation of questions raised by this case is misleading.

STATEMENT OF THE CASE

This is an appeal from a judgment that the State of Washington's Initiative 350,

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(footnote 1 continued)

members of the Seattle School District Board of Directors, as Board members and with their spouses as guardians ad litem for their named Seattle student children, and (f) certain persons, individually and as guardians ad litem for their named Seattle student children.

which "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments," is unconstitutional under the Equal Protection Clause of the fourteenth amendment. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980), aff'g in part, rev'g and remanding as to denial of attorneys' fees award, 473 F. Supp. 996 (W.D. Wash. 1979) (quote at 1015).

Both the district court and the court of appeals below determined, and the State of Washington does not dispute, that Initiative 350 legislatively differentiates between student assignment for the purpose of school desegregation and student assignment for any other significant reason, Finding of Fact No. 8.3, Seattle School District No. 1, 473 F. Supp. at 1010,

without the justification of a compelling state interest. The legal result of these factual determinations by the lower courts is automatic under Hunter v. Erickson, 393 U.S. 385 (1969), and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). Accordingly, there is no question upon which disposition of this case depends; further argument is not needed. Sup. Ct. R. 16.1(c). The questions presented by the State are not substantial.

The district court also held Initiative 350 unconstitutional because the court found the Initiative was motivated at least in part by the discriminatory purpose to impede school desegregation. The district court's findings of fact on this issue are supported by substantial evidence, and are not clearly erroneous. Fed. R. Civ. P. 52(a). Again, the legal result flowing from the facts found is automatic under

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Accordingly, no substantial question exists; further argument is not needed.

The district court also found that Initiative 350 is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation.

On appeal, the Ninth Circuit relied on the first ground above to find Initiative 350 unconstitutional. It did not reach the other issues. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980). The panel concluded that Initiative 350 creates an impermissible racial classification unsupported by any compelling state interest. Id. at 1342.

The State petitioned the Ninth Circuit for rehearing and suggested en banc determination. The State's petition was denied. Except for the lone dissenter on the Ninth Circuit panel, no judge on the Ninth Circuit voted to accept en banc determination.

The result in this case is controlled by Findings of Fact firmly grounded in the evidence. Thus, this Court should dismiss the appeal or affirm the judgment below.

STATEMENT OF FACTS

The Seattle School District No. 1, the Tacoma School District No. 10 and the Pasco School District No. 1 ("School Districts") have been committed for several years to achieving and maintaining racially desegregated public schools. That commitment is based on the School Districts' obligations under state and federal law, and on the School Districts' policy judgment

that racially integrated education is an important educational objective [Ex. 12].

One element of the School Districts' plans to achieve and maintain racially desegregated schools involves some student assignment to schools beyond their nearest or next-nearest schools. The plans were adopted by the locally elected Board of Directors of the School Districts, after lengthy processes of public hearings marked by extensive citizen participation and advice.

In Seattle, hearings revealed strong citizen desire for stability and predictability in student assignments, for neighborhood students and friends to remain together, and for the opportunity for voluntary alternatives to mandatory student assignments. The School Board established equity of movement as between majority and minority students and preservation of ethnic identity as essential features of

any desegregation plan. Accordingly, the Seattle Plan, as adopted by a vote of six to one in December 1977, "pairs" or "triads" elementary school attendance area resident populations, with exchanges of students between and among the paired and triaded schools according to restructured grade configurations. Thus, individual students are assigned initially not on the basis of their race, but together with all other students in their neighborhood. Secondary schools are desegregated by restructured feeder patterns; students who attend elementary school together also attend secondary school together. Magnet and other optional programs remain an integral part of the plan, and students may voluntarily select alternatives to their initial fixed assignments consistent with the District's desegregation goals. Thus, while the initial assignment for students involved in the Plan is "mandatory,"

extensive voluntary options remain available to students. [Ex. 7, Ex. 12, Findings of Fact 6.9, 6.10, 6.11, 6.12.][2]

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[2] The Seattle Plan has now operated successfully for three school years. The Seattle Plan's goal of eliminating racial imbalance has been achieved. In February 1981 the Seattle School Board adopted (again by a vote of six to one) a three-year plan for stable desegregation maintenance for 1981-84. Compare the facts of Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980), cert. denied, 68 L. Ed. 2d 238 (1981). Contrary to the "conventional wisdom" that mandatory busing for desegregation causes substantial "white flight" and is therefore counterproductive to the goal of long-range desegregation, white student attrition in Seattle has been roughly the same in the three years of the Seattle Plan's operation as it was in the three years preceding the Plan. See Finding of Fact 11.3, Seattle School District No. 1, 473 F. Supp. at 1010-11. Test scores in Seattle have improved since the Seattle Plan began. In elections for two Seattle School Board seats in November 1979, when virtually the only issue which received media attention was desegregation, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates.

Desegregation in Seattle is working, consistent with statements in the State's own Exhibit A-133 [Harris Poll] at pages ix, x and 40:

In 1978, opponents of the Seattle Plan for desegregation, in an attempt to halt operation of the desegregation program, developed and proposed Initiative 350 to the voters of the State of Washington. The Initiative makes it unlawful for local school boards or any state agency to assign students beyond their nearest or next-nearest schools for the purpose of school desegregation. Initiative 350 allows all other major types of student assignment to

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(footnote 2 continued)

> While there are whites who are still emotionally disturbed at the notion of busing for racial balance, the almost automatic claim that "busing is a disaster" simply does not hold up in the face of the facts from this study . . . . The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea, which appears not to work badly at all when put into practice. . . . Among whites whose children have been bused for desegregation, 78% say the experience is satisfactory or highly satisfactory.

schools beyond their nearest or next-nearest schools. Only busing for desegregation was removed from the realm of local school district authority.

The voters of the State of Washington adopted the Initiative. In Seattle's predominantly minority 37th Legislative District, the Initiative failed.

The State attempts in its Jurisdictional Statement to minimize the impact of Initiative 350. The facts do not support the State's position. The Initiative would have an immediate and drastic segregative impact.

The district court found, and the court of appeals agreed, that under Initiative 350 the desegregation of a significant number of Seattle schools will be prevented and the school system will become more racially imbalanced. Initiative 350 will make it impossible for Tacoma to maintain

its present racial balance.[3] It is doubtful the Pasco schools can be desegregated within the "nearest or next-nearest" restrictions of Initiative 350.

The racial classification created by Initiative 350 involves the restructuring of the political process to the disadvantage of minorities. Seattle School District No. 1, 633 F.2d at 1344. Under the Initiative, desegregation plans which include mandatory student assignment, formerly a matter of local jurisdiction and control, are illegal unless and until a majority of the State's voters or the State Legislature

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[3] Although the State professes bewilderment at the presence of the Tacoma School District in the litigation (Jurisdictional Statement at 9), the undisputed evidence at trial was that some black students in Tacoma are denied admission to their nearest or next-nearest schools under the Tacoma desegregation plan. See, e.g., Finding of Fact 5.14. Thus, at least as to those students, the Tacoma plan is a "mandatory" one which would contravene Initiative 350.

agrees to repeal Initiative 350. Id. All other mandatory student assignments remain under local control.

GROUNDS FOR MOTION TO DISMISS OR AFFIRM

The questions raised by the State's appeal are not substantial. Existing law is clear on each question which this case presents. Thus, the State's appeal should be dismissed or, alternatively, the court of appeals decision should be affirmed.

A. Initiative 350 is Unconstitutional Because It Establishes an Impermissible Racial Classification.

The United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington correctly concluded that Initiative 350 establishes an impermissible racial classification. Because no compelling state interest justifies that classification, it must fall.

Both courts recognized that this case is governed by Hunter v. Erickson, 393 U.S. 385 (1969) and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971).

In Hunter, this Court held that section 137 of the Akron, Ohio, City Charter violated the fourteenth amendment. The Charter provision prevented the City Council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters.

The Court found that section 137 created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." Id. at 389. The Court pierced the superficial neutrality of the provision and said that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that

the law's impact falls on the minority." Id. at 391. The Court applied the "suspect classification" test to the provision "[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." Id. at 391-92. None of Akron's justifications for section 137 amounted to a compelling state interest. Therefore, the Court found that the provision violated the fourteenth amendment.

Justice Harlan's concurrence focused on the manner in which section 137 structured the political process in a nonneutral, racially discriminatory manner:

> Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.

Id. at 395.

Such a provision is "discriminatory on its face," and must fall "unless it can be

supported by state interests of the most weighty and substantial kind"--which were not present in Hunter. Id. at 393.

A three-judge court held Hunter dispositive of the question presented in Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). At issue was a New York statute which prohibited "state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance." Id. at 712.

Hunter, according to the court in Lee v. Nyquist, stands for the principle that "the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." Id. at 718.

The statute considered in Lee v. Nyquist had that effect. It "create[d] a single exception to the broad supervisory powers that the State Commissioner of Education exercises over local public education." Id. The exception "places burdens on the implementation of educational policies designed to deal with race on a local level," "operates in practice as a racial classification," is not excused by any "compelling justification," and is therefore a violation of the fourteenth amendment. Id. at 718-19. The Supreme Court left the lower court's opinion intact by summarily affirming.

Here, the court of appeals and the district court recognized that Initiative 350 is like the charter provision in Hunter and the statute in Lee. It creates a racial classification, treating racial student assignment matters differently from other student assignment matters. The

law's impact falls on the minority by dismantling operative public school desegregation programs, by preventing future local adoption of such programs, and by requiring expensive litigation for vindication of constitutional rights. The law is precisely targeted at voluntary local adoption of desegregation plans and thus specially burdens, indeed forecloses, the attainment through the local political process of important minority educational goals [Exs. 68, 94]. The law structures the political process in a nonneutral manner.[4]

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[4] In its Jurisdictional Statement at 15, the State refers to the case of Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) ("the State Funding case"), as authority for the proposition that all matters of school governance are now the province of the State rather than the local school board, and thus Initiative 350 does not structure the process in a nonneutral manner. This characterization is inaccurate and immaterial. The State Funding case held unconstitutional the State's reliance on voter approval of

(footnote 4 continued)

special excess levy funding to discharge the State's "paramount" constitutional duty to make ample provision for education of its resident children. The Washington Supreme Court required the State legislature to define adequately "basic education" and to fund fully that "basic education" on or before July 1, 1981. Id. at 484, 585 P.2d at 77. The State has taken several steps in partial satisfaction of this duty.

Initiative 350, however, is irrelevant to the Washington Supreme Court's decision in the State Funding case. Initiative 350 was not adopted to fulfill the State Supreme Court's mandate to the State legislature in the State Funding case. It does not purport to define "basic education" or to fund it fully, but rather seeks to regulate student assignment authority--a subject untouched in Washington's Basic Education Act, c. 359, 1977 Wash. Laws 1606, 1st Ex. Sess., amended by c. 250, 1979 Wash. Laws 2029, 1st Ex. Sess. Far from "virtually eliminating local school district autonomy," the Basic Education Act sets certain minimum standards for local school districts to be eligible for state funding, but leaves most traditional local functions under local control. Those who drafted, proposed and adopted Initiative 350 did not have the State Funding case in mind and there is no evidence in the record, or elsewhere, that they did. Their expressed purpose was to end student transfers for the purpose of achieving racial desegregation in the public schools of Seattle. See Finding of Fact 7.14, Seattle School Dist.

Initiative 350 is not justified by a compelling state interest. Indeed, the State has failed to proffer any such justifying interest. In contrast, Initiative 350 is directly opposed to the compelling state interest in public school racial

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(footnote 4 continued)

No. 1, 473 F. Supp. at 1008. That traditional local function was usurped through the State initiative process. See Finding of Fact 8.2, id. at 1010.

Indeed, the Washington Supreme Court has expressly declared in a unanimous decision that local school districts have existing authority under State law to assign students to other than their nearest or next-nearest schools in order to achieve racial desegregation. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972). That case, incidentally, was initiated by opponents of an earlier Seattle School District plan for racial desegregation. See Finding of Fact 6.3, Seattle School Dist. No. 1, 473 F. Supp. at 1006.

Even if Washington State law had usurped all local autonomy in all educational decisions, Lee v. Nyquist, which invalidated a statute regulating state officials' authority over student assignment, would still control the result here.

desegregation, DeFunis v. Odegaard, 82 Wash. 2d 11, 34-35, 507 P.2d 1169, 1183 (1973), vacated as moot, 416 U.S. 312 (1974) (per curiam).

The State is simply incorrect when it asserts in its Jurisdictional Statement that the holding of the court of appeals that Initiative 350 creates a racial classification, thereby obviating any inquiry into intent, represents a shift in equal protection analysis which should be reviewed by this Court. On the contrary, this Court has not approved an invidious racial classification since Korematsu v. United States, 323 U.S. 214 (1944).

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), a case relied upon by the State, clearly demonstrates that the court of appeals and the district court properly applied the most recent statement of equal protection analysis:

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483; MacLaughlin v. Florida, 379 U.S. 184.

Id. at 272 (emphasis added).

In the case of Initiative 350, the court of appeals and the district court correctly concluded, based on the evidence, that a racial classification was created. Pursuant to Feeney, that racial classification is presumptively invalid "regardless of purported motivation." As the State has failed to provide "an extraordinary justification" for the racial classification created by Initiative 350, the statute must fall.

Contrary to the State's assertion, James v. Valtierra, 402 U.S. 137 (1971), has no relevance to this case. As the

Court pointed out in Valtierra, California's article XXXIV, unlike the Akron referendum provision in Hunter, requires referendum approval for any low rent public housing project, not only for projects which will be occupied by a racial minority. California's article XXXIV creates no racial classification. Initiative 350, on the other hand, is aimed solely at busing for desegregation. Most, if not all, major nonracial reasons for busing students beyond their nearest or next-nearest schools are allowed under Initiative 350.[5] Furthermore, as the undisputed findings of fact of the district court amply demonstrate, the record shows and the court of appeals confirmed that Initiative 350 in fact "was conceived, drafted,

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[5] The court of appeals concurred in the district court's finding of fact on this issue. Seattle School Dist. No. 1, 633 F.2d at 1344 n.4.

advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." Seattle School District No. 1, 473 F. Supp. at 1015.

In addition, Hunter v. Erickson and Lee v. Nyquist dispose of Questions I, II, III and VI as articulated by the State in its Jurisdictional Statement, for the following reasons:

Question I. The first question raised by the State is whether a desegregation program, once it is underway, may ever be discontinued without violating the fourteenth amendment, even in the absence of any constitutional duty on the part of a local school board to implement such a desegregation program in the first instance.

There may well be situations in which a local school board decision to voluntarily desegregate may be rescinded without violating the fourteenth amendment. See Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977) (rescission of resolutions pledging desegregation, where prior to implementation of desegregation program, not in and of itself unconstitutional): "The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. Reitman v. Mulkey. . . ."

But such a program may not be discontinued by the passage of state legislation which creates an impermissible racial classification. As the court of appeals and the district court recognized, Initiative 350 creates such an impermissible racial classification. Hunter and Lee

clearly resolve the question raised by the State, at least as applicable to Initiative 350.

Question II. The second question raised by the State asks whether a preexisting "racially neutral neighborhood school assignment policy" may only be restored by a local school board or whether it may also be restored by a State.

Again, it is possible such a restoration may occur without violating constitutional prohibitions.[6] Initiative 350, however, does not restore a "racially neutral neighborhood school assignment policy." On the contrary, as the court of appeals and the district court recognized,

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[6] As the State points out in its Jurisdictional Statement at p. 6, whether racially neutral student assignment policies preceded the School Districts' desegregation programs, such that they could be "restored," is a question that was not addressed in the district court, but rather left for "Phase II" of the litigation should Initiative 350 be declared constitutional.

it creates a racial classification. Initiative 350 mandates a neighborhood school policy only for desegregation purposes. For all other purposes, local school boards remain empowered to assign students beyond their nearest or next-nearest schools. Because Initiative 350 creates a racially biased neighborhood school assignment policy, Hunter and Lee require the conclusion it violates the prohibitions of the fourteenth amendment.

Question III. The third question raised by the State is whether a state statute which does not "explicitly" use race as a criterion nevertheless creates an impermissible racial classification because it addresses a racial issue. This issue was clearly answered by the court of appeals:

> Initiative 350 implicitly effects precisely the same classification which was made explicit in Lee; the law treats a single purpose for

> student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of Hunter and Lee. Unless this court affirms the relevancy of the constitutional analysis applied in Hunter and Lee to this case, the guarantee of equal protection of laws will become a hollow shell. Lawmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals.

633 F.2d at 1344.

Question VI. Finally, in its Question VI, the State asserts there is no invidious racial classification created by Initiative 350, because the Initiative is patterned after federal statutes which have been judicially upheld. The court of appeals, however, also clearly answered this question.

> Although the statutory language of Initiative 350 and the Eagleton-Biden amendment [anti-busing rider

> to HEW appropriation] are superficially similar, the operative and intended effects of the statutes are vastly different. The Title VI amendments were merely an internal administrative housekeeping measure designed to limit HEW's ability to order mandatory busing.

633 F.2d at 1347.

The court of appeals noted that Congress, in enacting the federal statutes to which the State refers, simply wanted to insure that mandatory busing orders derived either from local school officials or federal courts. Unlike Initiative 350, these federal statutes do not create impermissible racial classifications.

Moreover, the Equal Educational Opportunity Act of 1974 explicitly preserves, in deference to Brown v. Board of Education (Brown II), 349 U.S. 294, 299 (1955), the authority of local school districts to desegregate:

> Nothing in this part prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise

> lawful, that is at variance with the standards set out in this part nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this part, if such plan is voluntarily proposed by the appropriate educational agency.

20 U.S.C. § 1716.

In Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980), the court of appeals noted that the Eagleton-Biden amendment does not involve a flat prohibition against involuntary busing. The court emphasized that local school officials, for example, still may voluntarily employ transportation to desegregate. All reasonable desegregation methods remain available to school officials, to the Justice Department, and to the courts. If there had been such a blanket prohibition against desegregation, the court implied, the amendment would not survive constitutional scrutiny.

As the court of appeals in this case pointed out, Initiative 350, unlike the

Eagleton-Biden amendment and the Equal Educational Opportunity Act of 1974, flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. Because Initiative 350 does preclude local school authorities from voluntarily busing to achieve desegregation, and does so via a statute that embodies a burdensome racial classification in violation of the principles of Hunter and Lee, Brown v. Califano is inapposite. There is no need to harmonize these decisions further; they are consistent.[7]

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[7] California's Proposition I, while similar to Initiative 350 in origin and purpose, expressly preserves the authority of local school boards to desegregate, and at least in that sense is the very antithesis of Initiative 350, which forbids student assignment for desegregation. Crawford v. Board of Education, 113 Cal. App 3d 633, 170 Cal. Rptr. 495 (1980), petition for

Hunter v. Erickson and Lee v. Nyquist clearly govern the disposition of this case. No substantial federal questions are raised. Thus, this Court should dismiss the State's appeal or, alternatively, affirm the court of appeals' determination.

B. Initiative 350 is Unconstitutional Because It Was Adopted With a Racially Discriminatory Purpose.

The district court correctly concluded that even if Initiative 350 is not regarded as creating an impermissible racial classification on its face, fourteenth amendment tests formulated by the Supreme Court invalidate it. The court of appeals did not address this issue.

In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429

(footnote 7 continued)

hearing denied, (Cal. March 11, 1981), petition for cert. filed, (U.S. July 8, 1981) (No. 81-38).

U.S. 252 (1977), the Court set out the following factors as indices of whether a particular governmental action is impermissibly infused with discriminatory intent:

(a) The impact of the action, i.e., whether it bears more heavily on one race than another;

(b) the historical background of the decision;

(c) the specific sequence of events leading to the decision;

(d) the procedural and substantive departures from the norm in connection with the decision or action; and

(e) the legislative or administrative history of a decision or action. Id. at 266-68.

Substantial evidence supports the district court's conclusion that Initiative 350 is purposefully segregative and discriminatory, and constitutes an equal protection violation under the tests set

forth in Arlington Heights. The district court's findings of fact in this regard are undisputed.

First, the district court recognized that the negative impact of Initiative 350 on minorities is plainly seen in the demonstrable, easily foreseeable dramatic increase in school segregation, and consequent educational impairments, which Initiative 350 would cause in Seattle. No longer will the inconvenience of desegregation be shared equitably between minority and majority students.

Second, the district court found the historical background of Initiative 350, the sequence of events leading to its enactment, and the legislative and administrative history of the Initiative make clear the measure's intent to undo Seattle's desegregation plan. Indeed, the State in its Jurisdictional Statement at

page 4 admits this was the intent of Initiative 350.

Third, as to procedural and substantive departures from the norm in connection with enactment of the Initiative, the district court concluded that Initiative 350 uses the statewide initiative process to deal with a local school district matter. This is a definite departure from the norm. Furthermore, an additional departure from the norm is the State's removal from local school districts of the power to decide whether to assign students beyond their nearest or next-nearest schools for purposes of desegregation, while allowing local school districts discretion to reassign students manditorily for all other major purposes.

As the district court recognized, the above plainly shows that the impermissible purposes of frustrating desegregation and

treating racial student assignments differently from nonracial student assignments were among the motivating factors behind the creation and adoption of Initiative 350. Initiative 350 invidiously discriminates against efforts to promote equal educational opportunity by reducing racial imbalance in the schools. This purpose is impermissible. Lee v. Nyquist, 318 F. Supp. at 720.

Where discriminatory purpose is a motivating factor of legislation, judicial deference to legislative decisions is "no longer justified." Arlington Heights, 429 U.S. at 265-66. Since an impermissible purpose was a motivating factor in the adoption of Initiative 350, the burden shifts to defendants to prove the same statute would have been adopted in the same manner at the same time even in the absence of the impermissible purpose. Arlington Heights, 429 U.S. at 270 n.21. The State

failed to produce any evidence that Initiative 350 would have been enacted in November 1978 wholly apart from its purpose to stop the Seattle Plan for desegregation. The State therefore failed to meet its burden under Arlington Heights. Ayers v. Western Line Consolidated School District, 555 F.2d 1309, 1315 (5th Cir. 1977), vacated in part and remanded on other grounds sub nom. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Question IV raised by the State in its Jurisdictional Statement is misleading. It asks merely whether statutory restoration of a neighborhood school assignment policy constitutes racially discriminatory State action. As the Ninth Circuit held in Diaz v. San Jose Unified School District, 612 F.2d 411 (9th Cir. 1979), a neighborhood school policy in and of itself has no constitutional significance.

A penetrating examination of the complete context in which the neighborhood school policy was initially applied and subsequently enforced must be conducted to determine the presence or absence of a racially discriminatory purpose. In the case of Initiative 350, no neutral neighborhood school assignment policy is created. In fact, Initiative 350 creates a neighborhood school assignment policy only for desegregation; all other purposes of student assignment beyond nearest or next-nearest schools are allowed to remain.

In its inquiry into the purpose of Initiative 350, the district court considered foreseeable and anticipated disparate racial impact as evidence to prove the ultimate fact, racially discriminatory purpose. The State asserts this procedure is contrary to law.

This Court, however, in the Columbus case, clearly affirms the district court's method:

> [T]he District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." Id., at 255. Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." Ibid. The District Court thus stayed well within the requirements of Washington v. Davis and Arlington Heights. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 n.25, (1979).

Columbus Board of Education v. Penick, 443 U.S. 449, 464-65 (1979).

The district court fully complied with applicable tests to determine the purpose of Initiative 350. The State has failed to raise a substantial federal question.

In addition, the State incorrectly maintains the district court refused to consider offered evidence of the allegedly benign subjective intent of the electorate. In fact, the district court denied the School Districts' motion in limine at trial to exclude evidence of the subjective intent of the electorate. The record is replete with such evidence, although its trustworthiness is slight. Much testimony revealed the unreliability of the State's evidence. See, e.g., Ex. 128; Ex. A-133, pp. ix-x, 13-14, 32-40; Ex. 37, pp. 108-18; Transcript 349-51, 1185, 1289-344, 1351-69, 1435-42. Indeed, the district court made specific findings of fact relating to the subjective intent of the electorate. E.g., Findings of Fact 7.30, 7.32, 7.33. And the district court emphasized its decision was rendered only "[a]fter considering all of the evidence . . . ." Seattle School District No. 1, 473 F. Supp. at 1012.

In summary, the district court's conclusion that Initiative 350 is invalid because it was adopted at least in part due to a racially discriminatory purpose is based on substantial evidence and should be affirmed, consistent with Columbus. The district court considered all the evidence, subjective as well as objective (contrary to the State's assertions), analyzing the purpose of Initiative 350 pursuant to the tests recently set forth by this Court. In the context of all the evidence, the discriminatory purpose of Initiative 350 is clear.

On this issue, also, the State's appeal should be dismissed as not raising a substantial federal question. Alternatively, the lower court decision should be affirmed.

C. Initiative 350 is Unconstitutional Because it is Overinclusive.

The district court correctly recognized that Initiative 350 is overly

inclusive. The statute prohibits all district-directed extra-neighborhood desegregation assignments (except pursuant to court order) regardless of whether there is any constitutional duty to desegregate. The court of appeals did not address this issue.

Overinclusive statutes impinging upon important rights (such as the right to equal protection of the laws) are invalid. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974) (speech); Eisenstadt v. Baird, 405 U.S. 438 (1972) (equal protection; privacy/contraception); United States v. Robel, 389 U.S. 258 (1967) (association); Carrington v. Rash, 380 U.S. 89 (1965) (voting); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (travel); see generally Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351-53 (1949).

Initiative 350's overinclusiveness conflicts with principles considered fundamental since the original Brown school desegregation litigation. Local school authorities have the primary responsibility to assure the equal protection rights of students. Brown v. Board of Education (Brown II), 349 U.S. 294, 299 (1955). Local autonomy of school districts is a vital national tradition. Dayton Board of Education v. Brinkman, 433 U.S. 406, 410 (1977); Milliken v. Bradley, 418 U.S. 717, 741-42 (1974). Limitations on the student assignment powers of local school districts operate "to inhibit or obstruct the operation of a unitary school system," North Carolina Board of Education v. Swann, 402 U.S. 43, 45 (1971), and must therefore fall. Bradley v. Milliken, 433 F.2d 897, 903 (6th Cir. 1970); Santa Barbara School District v. Superior Court,

13 Cal. 3d 315, 530 P.2d 605, 613-15, 118 Cal. Rptr. 637 (1975).

Moreover, Initiative 350 prevents local school districts from voluntarily desegregating their schools as a matter of educational policy in order to prepare students to live in a pluralistic society [Finding of Fact 8.10], contrary to the teaching of Swann v. Charlotte-Mecklenburg Board of Education:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .

402 U.S. 1, 16 (1971). Cf. Ex. 12 (Seattle School District Resolution 1977-28); 20 U.S.C. § 1716 (1976).

Because Initiative 350 removes local school district discretion to assign students to reduce racial imbalance, common sense dictates that it is facially unconstitutional. Local school districts cannot carry out their primary responsibility to safeguard equal protection rights under Brown II, and simultaneously maintain local autonomy, if they are totally deprived of the one tool--student reassignment--which courts often find is the only method by which constitutional duties may be satisfied.

The State has purported to adopt an interpretation of Initiative 350 that would free local school districts to desegregate their schools if constitutionally required. As a result, the State argues, the Initiative is not overinclusive. See Question VII raised in the State's Jurisdictional Statement.

This argument would be attractive were it not for the clear language of Initiative 350. That language states explicitly local school districts shall not assign students beyond their nearest or next-nearest schools for desegregation, unless required to do so by a court order.

Courts are not free to adopt an interpretation of a statute which is contrary to the clear meaning of its language. Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), cert. denied, 440 U.S. 958 (1979). The district court did adopt the construction of the statute intended by its proponents. Because the State's interpretation has no basis in the language or "legislative history" of Initiative 350, the court is not free to adopt it.

Thus, the district court's conclusion that Initiative 350 is constitutionally

infirm because it is overly inclusive is correct, and should be affirmed.

No substantial federal question is raised by the district court's ruling. Thus, the Supreme Court should dismiss the State's appeal or, in the alternative, affirm the ruling of the court of appeals.

D. The Court of Appeals Correctly Ruled in Granting Successful School District Plaintiffs Their Costs and Attorneys' Fees.

The court of appeals correctly concluded that the general Attorney's Fees Statute, 42 U.S.C. § 1988, and the statute dealing specifically with school desegregation cases, 20 U.S.C. § 3205, justified an award of attorneys' fees in this case to successful school district plaintiffs.

This Court has interpreted these statutes as requiring "the successful plaintiff should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust.'" Northcross

v. Board of Education, 412 U.S. 427, 428 (1973), quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Given the quarter century of judicial encouragement of local school districts to recognize their constitutional obligations in this area, it would be surprising indeed if local school boards' protection of the constitutional rights of students were now considered a "special circumstance." Such school board behavior should be the norm.

The court of appeals noted the congressional purpose in providing attorneys' fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law. There is nothing in the language or the legislative history of the statutes indicating a congressional intent to limit attorneys' fees to private parties. So long as a

publicly funded organization advances important constitutional values, it is eligible for fees under the statutes. See Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Oldhan v. Erhlich, 617 F.2d 163 (8th Cir. 1980); Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980), cert. denied, 101 S. Ct. 115 (1980); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), cert. denied sub. nom. Blum v. Holley, 446 U.S. 913 (1980); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir.), cert. denied, 444 U.S. 880 (1979).

It is incorrect for the State to assert that it has already funded this litigation. Both State appropriations to local school districts and funds raised locally by voter-approved property tax levies are used to support the budgets of the School Districts, including their relatively minor litigation budgets. All funds not used for litigation purposes are

available for their intended and rightful purpose--the education of the schoolchildren of the School Districts. In this case, an award of attorneys' fees to the School Districts will go directly to the benefit of the schoolchildren of the School Districts. Education should not be diminished by expenditures necessary to resist unconstitutional State laws.

It should also be pointed out that at the very beginning of this litigation, the School Districts made a formal demand that the State of Washington fulfill its constitutional duty to challenge Initiative 350. Had the State responded as then demanded, it would not now be liable for the School Districts' attorneys' fees.

Moreover, Congress has already determined the policy applicable to this case. In adopting the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988 (1976), Congress determined the public interest is

served by encouraging litigation enforcing the Civil Rights Statutes. See Seattle School District No. 1, 633 F.2d at 1348. The State's policy arguments must fall to this congressional determination.

No substantial federal issue is raised by the State's appeal concerning attorneys' fees. Thus, the Supreme Court should dismiss the State's appeal, or, in the alternative, affirm the ruling of the court of appeals.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

DATED this 24th day of July, 1981.

Respectfully submitted,

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APPENDIX A

ADDITIONAL STATUTORY PROVISIONS

42 U.S.C. § 1983 1979 Supp. (III)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000d (1976) (Title VI, 1964 Civil Rights Act)

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-9

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment is violated by a state initiative that forbids local school districts—in the absence of a need to remedy a constitutional violation—from assigning students to schools beyond the school geographically nearest or next nearest the student's place of residence, except where such assignment is made for health, safety or special educational purposes or is in response to inadequate or unfit conditions.*

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*Appellants also challenge an attorney's fee award to parties other than the United States. We do not address that issue.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. B-1 to B-29) is reported at 633 F. 2d 1338, and the opinion of the district court (J.S. App. A-1 to A-36) is reported at 473 F. Supp. 996.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1980, and a petition for rehearing was denied on March 26, 1981 (Pet. App. E-1). A notice of appeal was filed on May 18, 1981 (Pet. App. D-1 to D-6), and the appeal was docketed on June 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1. Seattle, Tacoma, and Pasco school districts are municipal corporations created under the laws of the State of Washington. The public policy of the State of Washington with respect to public education is set forth in Article

IX, Section 1 of its constitution, which states: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Article IX, Section 2 of the constitution provides that "[t]he legislature shall provide for a general and uniform system of public schools," and that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." It is apparently uncontested that (J.S. 4) "no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools."

2. On December 14, 1977, the Seattle school board adopted a resolution which selected strategies to be used in eliminating perceived racial imbalance in the district's schools and also directed the district's administrative staff to continue developing a "desegregation" plan (J.S. App. A-17). Thereafter, in March 1978, the Seattle school district adopted a plan of race-conscious student assignments to create racial balance in the district's schools. A principal component of the plan was the mandatory assignment of entire neighborhoods of students to schools beyond those closest to the students' homes (*id.* at A-17 to A-18). Similar race-conscious student assignment policies were adopted and implemented by the school districts of Tacoma and Pasco (*id.* at A-9 to A-14).

In January 1978, Citizens for Voluntary Integration Committee ("CiVIC"), a voluntary citizens committee opposed to the Seattle policy of race-conscious student assignments, was organized as a nonprofit corporation under Washington law (J.S. App. A-19). CiVIC drafted, for submission to the voters of the state at the 1978 general election, Initiative 350, which provides in pertinent part:

"[N]o school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *" (Wash. Rev. Code Ann. § 28A.26.010 (Cum. Supp. 1981)). Initiative 350 does allow school assignments to be made beyond the nearest or next nearest school "[i]f a student requires special education, care or guidance"; "[i]f there are health or safety hazards" between the student's residence and the neighborhood school; or if the neighborhood school "is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (*ibid.*). Initiative 350 also expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981). In November 1978, Initiative 350 was approved by approximately 66% of the voters statewide. The Initiative failed in only two legislative districts, both in Seattle (J.S. App. A-22).

3. In November 1978, the Seattle, Tacoma and Pasco school districts, together with certain individual plaintiffs, brought this action against the State of Washington and various state officials in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment (J.S. App. A-1 to A-3, A-6). Numerous parties intervened (*id.* at A-3 to A-6), including the United States, which intervened on behalf of the plaintiffs under 42 U.S.C. 2000h-2. The district court permanently enjoined enforcement of Initiative 350, holding that it violated the Equal Protection Clause for three reasons (J.S. App. A-27):

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for

purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

4. The court of appeals affirmed by divided vote (J.S. App. B-1 to B-29). Relying on this Court's decision in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and the decision of the district court in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the court of appeals held that Initiative 350 is unconstitutional because it embodies an impermissible legislative classification based on race (J.S. App. B-4). The court stated (*id.* at B-7 to B-8):

> Applying the[] principles [of *Hunter* and *Lee*] here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of *Hunter* and *Lee*.

Despite the state's constitutional responsibility for providing public education and the limited role of local school boards under Washington law, the court of appeals concluded that "[t]he interest of the State of Washington in mandating a state-wide policy of neighborhood schools

must * * * fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy" (J.S. App. B-11). The court held that the Initiative was unconstitutional because it was not supported by a "compelling state interest" (*ibid.*), and therefore found it unnecessary to address the questions whether the district court had erred in holding that the Initiative was motivated by a discriminatory purpose and is constitutionally overbroad (*id.* at B-4).

In dissent (J.S. App. B-18 to B-29), Judge Wright stated that the majority's reliance on *Hunter* v. *Erickson, supra*, and *Lee* v. *Nyquist, supra*, was misplaced and that Initiative 350 does not create a racial classification by permitting isolated deviations from the neighborhood school policy for safety, health, and special educational purposes. See J.S. App. B-18 to B-24. Judge Wright also reached the other grounds relied on by the district court in invalidating the Initiative. The district court's factual findings on intent, Judge Wright concluded, had insufficient record support to establish that Initiative 350 was motivated by any racially discriminatory intent (*id.* at B-24 to B-27). Judge Wright also rejected the district court's "overbreadth" analysis because Section 6 (Wash. Rev. Code Ann. § 28A.26.060) permits departures from the neighborhood school policy when necessary to rectify constitutional violations, and thus does not threaten interference with the vindication of constitutional rights (J.S. App. B-27 to B-29).

ARGUMENT

The United States believes that the Court should note probable jurisdiction to consider the question whether, in these circumstances, a public initiative establishing a race-neutral statewide, neighborhood school policy violates the Fourteenth Amendment because it prohibits race-conscious

student assignments except to remedy a constitutional violation. While the United States argued in the lower courts that such an initiative was unconstitutional, we have reconsidered that position since the decision of the court of appeals. We disagree with the majority opinion below and with its holding that Initiative 350 is unconstitutional. The question is an important one with significant and far-reaching ramifications. It plainly deserves plenary consideration by this Court.

1. Initiative 350 does not, by its terms, classify persons according to race. Rather, it prohibits local school districts from assigning any student, without regard to race, to any school other than that nearest or next nearest to his residence, except for reasons of health, safety, or special educational needs or in response to unfit or inadequate conditions. This Court has never held that such a policy is a per se violation of the Equal Protection Clause. Where, as here, "the law on its face treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)), the challenged enactment will violate the Equal Protection Clause only if it "places special burdens on racial minorities within the governmental process" (*ibid.*), and those burdens are not justified by some compelling state interest (*id.* at 392).

Based on this Court's decision in *Hunter* v. *Erickson*, *supra*, and on the district court decision in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the majority of the court of appeals found that Initiative 350 creates "special burdens" that are not justified by any compelling state interest. As Judge Wright pointed out in dissent, however, those cases are not controlling here.

In *Hunter* v. *Erickson, supra*, the Court upheld a constitutional challenge to a city charter amendment requiring the approval by a majority of voters in a general referendum with respect to any ordinance forbidding discrimination "on the basis of race, color, religion, national origin or ancestry" in the sale or rental of real estate. Housing ordinances dealing with other issues would become effective merely on approval by the city council.

In finding a violation of the Equal Protection Clause, the Court reasoned in *Hunter* that the charter amendment created an "explicitly racial classification" (393 U.S. at 389) because it expressly targeted ordinances designed to eliminate racial discrimination in housing and subjected only those ordinances to a special legislative process that "obviously made it substantially more difficult to secure [their] enactment" (*id.* at 390). The constitutional deficiency in *Hunter* was not, of course, that the charter amendment dealt with an issue involving race, but that it visited "special burdens on racial minorities within the governmental process" (*id.* at 391). As the Court stated, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (*id.* at 393).

In *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), a three-judge district court applied *Hunter* to invalidate a New York statute explicitly prohibiting race-conscious student assignment by appointed school boards, but not by elected boards. The statute "structure[d] the internal governmental process in a manner not founded on neutral principles," and thus "operate[d] to disadvantage a minority, a racial minority, in the political process" (318 F. Supp. at 720). Accordingly, the

statute was found to deny racial minorities equal protection of the law.[1]

2. Initiative 350 does not alter the legislative process in the State of Washington in a way analogous to the measures at issue in *Hunter* v. *Erickson, supra,* and *Lee* v. *Nyquist, supra.* As Judge Wright points out in his dissent, the Washington Constitution entrusts formulation of educational policy to the State, and Initiative 350 is an exercise of the State's constitutional responsibilities in this field (J.S. App. B-23). Moreover, Initiative 350 does not subject state legislation sought by racial groups or other minorities to procedures more burdensome than those applicable to any other type of legislation. At most, the Initiative simply alters the State's previous allocation of responsibility for the assignment of students to schools in local jurisdictions (but without making any change in the method of reallocating that responsibility). Whether such action by the State constitutes an infringement of the Equal Protection Clause

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[1]In *Lee* the district court noted that "[t]he statute denies appointed officials the power to implement non-voluntary programs for the improvement of racial balance" to undo *de facto* or *de jure* segregation (318 F. Supp. at 714-715), and also that "[t]he statute is unambiguous on its face and clearly applies to all efforts to achieve racial balance, including such efforts by a school district subject to a pre-existing order to eliminate segregation in its schools * * *" (*id.* at 715). Here, of course, school districts may make racially-conscious assignments pursuant to a court order based on a finding of *de jure* segregation. See Wash. Rev. Code Ann. § 28A.26.060. Thus, this case is far different from *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971). Moreover, in this Court the State points out (J.S. 21) that the Initiative's legislative history and interpretation by state officials charged with its implementation indicate that Initiative 350 should be interpreted as permitting local officials to make race-conscious student assignments in order to remedy *de jure* segregation. The present case, therefore, differs significantly from *Lee* v. *Nyquist.*

to the extent that it forecloses local school boards from voluntarily utilizing race-conscious busing in the absence of a need to remedy *de jure* segregation, poses an issue discussed indirectly by the district court in *Lee* (see 318 F. Supp. at 714), but not there decided, nor ever given plenary consideration by this Court. Especially in light of the decade of judicial and educational experience since *Lee*,[2] we believe the Court should now give plenary consideration to this issue, partly for reasons explained by Justice Powell in *Keyes* v. *School District No. 1*, 413 U.S. 189, 242, 250 (1973) (Powell, J., concurring and dissenting in part).

There is another respect in which the decision below warrants the noting of probable jurisdiction. In *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), this Court considered a school board's rescission of a resolution in which its predecessor board recognized its own fault in not taking remedial measures with respect to student assignments.[3] In disposing of a constitutional challenge to the repudiation of the earlier resolution, the Court adopted the analysis of the court of appeals in that case, stating (*id.* at 414, quoting *Brinkman* v. *Gilligan*, 503 F. 2d 684, 697 (6th Cir. 1974)):

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[2] In addition to judicial experience in education cases, there is also the development of equal protection theory in such cases as *Washington* v. *Davis*, 426 U.S. 229 (1976), to be considered.

[3] We recognize that in *Dayton I* the Court noted that "[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date" (433 U.S. at 413-414). This difference between *Dayton I* and the present case does not, however, detract from the pertinence here of the Court's analysis.

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took. Cf. Hunter v. Erickson, 393 U.S. 385 . . . (1969); Gomillion v. Lightfoot, 364 U.S. 339 . . . (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation."

In the present case, it is clear that Seattle and other local school boards did not adopt their plans because of any finding of *de jure* segregation, judicial or otherwise. The majority below distinguished this Court's analysis in *Dayton I* on the ground that the plans here were rescinded not by a successor school board, but by statewide referendum (J.S. App. B-10 n.8). On the court of appeals' analysis, rescission of the mandatory student assignment policy by a successor school board would have been constitutionally valid, but rescission by a superior decision-making authority, the state electorate, was not. That reasoning is unsound. This Court's analysis in *Dayton I* rests not on the *identity* of the rescinding body, but on its *authority*. Here, it is undisputed that the State of Washington has ultimate authority over public educational policy. There is thus no proper basis for concluding that the action taken at the state level was any less valid than the court of appeals apparently concedes it would have been if taken at the local level.

Nor do we find persuasive the conclusion of the court below grounding constitutional infirmity on the fact that Initiative 350 leaves other questions of pupil assignment to local option. Even if some or all of those decisions were to be made on a statewide basis, the same basic argument could be made against the Initiative so long as other matters of school policy are left to local choice. Where, as here (and

unlike the situation in *Hunter*), the processes of governmental decision-making remain unchanged, it is not apparent that the rule of *Hunter* v. *Erickson* can logically be applied without requiring the State to resort to pervasive statewide policymaking in order to exercise its authority to adopt the particular statewide policy at issue here.[4]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals raises serious concerns that have prompted the United States to reexamine the position it took below. The question presented is a substantial one that has not heretofore received plenary consideration by this Court. Accordingly, the Court should note probable jurisdiction.

Respectfully submitted.

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Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

SEPTEMBER 1981

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[4]If the Court notes probable jurisdiction on this question and concludes that Initiative 350 is not constitutionally infirm under *Hunter* v. *Erickson*, *supra*, it may either remand the case to the court of appeals to consider the other grounds the district court relied on to invalidate Initiative 350 (see, *e.g.*, *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 23-27) or it may choose to decide those issues itself (see, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281 (1978)). See also page 8, note 1, *supra*).

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No. 81-9

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

This brief is submitted pursuant to Rule 16(5) in opposition to the Motion to Dismiss or Affirm filed by the school districts and other original plaintiffs in the District Court. We here address questions 1, 2 and 3 of that Motion only. We do not address question 4 presented in the districts' Motion, nor do we find it necessay to reply to the motions of the various intervenor plaintiffs.

ARGUMENT

I. PROPER CRITERIA FOR DETERMINING EXISTENCE OF INVIDIOUS RACIAL CLASSIFICATION

Throughout the districts' Motion to Dimiss or Affirm

("SSD Motion"), there runs a single major theme. Initiative 350 establishes an invidious racial classification. Accordingly, for purposes of the Fourteenth Amendment, it should be treated in the same manner as a law which requires separate schools, or separate eating facilities, or separate parks, for different racial groups. (See SSD Motion, pp. 13-32). In fact, that is exactly how the Court of Appeals and the District Court did treat it.

But did those courts use the proper criteria for determining whether an invidious racial classification exists? That is the single most important issue in this case. It is important because of the practical consequences which flow from how that issue is resolved. For if a law having the effect of prohibiting student transportation for racial balance does indeed result in a prohibited racial classification, that classification has at least two very interesting and unusual features.

First, the typical racial classification always denies members of the targeted racial group or groups a certain freedom of choice. By reason of their race, for example, they cannot go to a certain school, eat in a certain part of a restaurant, or vote in certain elections. But Initiative 350, in contrast, has no such effect. Indeed it was, instead, the decision of the Seattle School District, in adopting the Seattle Plan, which denied to members of specified racial groups their freedom of choice; *i.e.*, the choice to attend their neighborhood school no matter what their race might be. Concisely, Initiative 350 restored that freedom. Rather than create the usual sort of racial classification it thus eliminated one.

Secondly, members of racial minorities themselves, quite understandably, want the very type of freedom of choice which the Initiative restored. A nationwide survey in evidence in this case confirms that a majority of Black Americans now oppose forced bussing. Ex. A-133, pp. 37-41. The situation is no different in Seattle. As stated by the District's own Superintendent:

> "If you get out in your Asian community, your Black community, you will find a lot of opposition to it (forced bussing). It's not a popular thing." (Ex. A-118, p. 148)

Similarly, Dr. Tone of the Tacoma School District, a co-plaintiff below and a co-appellee here, testified that as many as 95 percent of all parents, majority and minority, with whom he came into contact expressed a preference for neighborhood schools. (RT, p. 391)

And again, Dr. Childers of the Pasco School District, another co-plaintiff and co-appellee, testified that if minority parents in that district had a choice, they would choose their neighborhood schools. (RT, pp. 634-638)

Thus, even within the minority communities, as well as the majority communities, there is a profound split on the issue of the supposed blessings of forced bussing. But, by holding that Initiative 350 constitutes an invidious racial classification, the lower courts have effectively held that the Fourteenth Amendment places this issue off-limits to the voters of Washington State or their elected representatives.

This, we submit, subverts entirely the precious values embodied in the Fourteenth Amendment.[1] And this is why this case is so important, and merits full review by this Court.

II. STANDARD FOR DETERMINING EXISTENCE OF A RACIALLY DISCRIMINATORY PURPOSE

Next, two related points raised by the school districts merit comment. First, they assert that the Initiative "legislatively differentiates between student assignment for the purpose of school desegregation and student assignments for any other significant reason" (SSD Motion, p. 3). They

---

[1]Note, in this regard, that the major issue in this case is identical to the major issue in *Crawford v. Board of Education of the City of Los Angeles*, No. 81-38, (Pet. for Cert. filed July 8, 1981). The thrust of the Petition for Certiorari in *Crawford* and that of the Motion to Dismiss or Affirm in this case are identical: Any state law which has the effect of impeding or stopping a program to achieve racial balance in schools, even though the program is not required by the Fourteenth Amendment, constitutes a racial classification prohibited by the Fourteenth Amendment. See the discusssion at pp. 17-27 Petition for Certiorari in *Crawford*, under the heading: "Proposition I is an Explicit Racial Classification Violative of the Equal Protection Clause of the Fourteenth Amendment."

correctly point out that the lower courts agreed with this assertion, but incorrectly state that we agree with it as well. (SSD Motion, p. 3).

As emphasized in the Amicus Brief filed by our sister states in this case,[2] the initiative prohibits all bussing which cannot be justified by specific needs of specific students, and the inability of a specific neighborhood school to meet those needs. Surely, as shown by Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 315-320, such a requirement of "individualized consideration without regard to * * * race" promotes, rather than offends, the values embodied in the Fourteenth Amendment. See, 438 U.S. at 318, n. 52.

In *Bakke*, of course, a special medical school admissions program for minorities was struck down. But assume that it had been upheld instead. Could the voters of California have then eliminated it? And if they could not, could the Regents of the University of California, who had instituted the program in the first place, have done so? Would such action have constituted an impermissible racial classification, or be invalid by reason of an impermissible discriminatory purpose?

This example illustrates the issues we raise in the first of our questions presented. And the school districts' response only shows the analytical confusion in which they are foundering. They state:

> "There may well be situations in which a local school board decision to voluntarily desegregate may be rescinded without violating the fourteenth amendment." (SSD Motion, p. 25).

They then go on:

> "But such a program may not be discontinued by the passage of state legislation which creates an impermissible racial classification." (Ibid.)

Of course not. But that begs totally the critical question we are raising: Why would not the decision of the local school board itself create an impermissible racial classification, or be evidence of an illicit discriminatory

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[2]See Brief of Amici States of Arizona, Kansas, Nebraska and Utah in Support of Jurisdictional Statement, p. 10.

purpose? Are the criteria for determining classification and purpose when the state makes the decision different from those which are applicable when the local board makes the decision? If so, why? And what are those differences?

The same analytical confusion is apparent in the school districts' further discussion of the criteria for determining a racially discriminatory purpose. They refer, for example, to "the measure's intent to undo Seattle's desegregation plan." (SSD Motion, p. 34).

But what if the local school board itself decides to undo the desegregation plan? Why is that not likewise an impermissible purpose? The school districts do not tell us.

III. A TRIGGERING COURT ORDER, EVEN IF REQUIRED, WOULD NOT RESULT IN CONSTITUTIONAL INVALIDITY

Finally, a word about the so-called "overbreadth" issue. (SSD Motion, pp. 41-47). The argument of the school districts is that the Initiative is unconstitutional because it requires a court finding of a violation of the Fourteenth Amendment before a school district may use forced bussing to achieve racial balance. This is so even if the district itself may think it has committed illegal acts of segregation.

Even if that interpretation of the Initiative is correct, and we do not concede here that it is,[3] this does not make it unconstitutional. The prerequisite of a triggering court order was not found to be constitutionally objectionable, for example, in *Brown v. Califano*, 627 F.2d 1221, 1227, n. 28 (D.C. Cir. 1980).[4]

This same point is perhaps best made by Justice Powell's opinion in *Bakke, supra*, as follows:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative

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[3]See, J.S., pp. 4, 21.

[4]See also Memorandum for the United States, p. 8, n. 1.

findings of constitutional or statutory violations. [438 U.S. at 307].

"* * *

"* * * Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

"Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. * * *" 438 U.S. at 308, 309.

That the Initiative puts the Seattle School District in essentially the same position as this Court thus put the University of California should hardly be considered a constitutional infirmity.

CONCLUSION

For the reasons given above and in our Jurisdictional Statement, the questions presented on this appeal are substantial; and this Court should, accordingly, note probable jurisdiction.

DATED this 18th day of September, 1981.

Respectfully submitted,

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On Appeal From The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF AMICI, STATES OF ARIZONA, KANSAS, NEBRASKA, AND UTAH IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF AMICI, STATES OF ARIZONA, KANSAS, NEBRASKA, AND UTAH IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF THE AMICI

The issue of mandatory bussing of children away from their neighborhood school is now the subject of a nationwide debate. The intensity of that debate reflects its importance. How it is resolved will surely affect the degree of public support for a school system which cannot effectively function without that support. It is, after

all, a *public* school system that is involved, with all that entails.

To what extent is that debate a useless exercise, even when, as in this case, it addresses bussing which is not constitutionally required? What role, if any, does the Equal Protection Clause leave to the public in resolving that debate?[1] These are the central questions presented by this appeal.

If the decision below were to be summarily affirmed, and thereby become the decision of this Court, the voters in all states might well be precluded from ever exercising their judgment — either directly through the ballot box, as here, or through their elected representatives in the legislature — in the area of school desegregation or, for that matter, in any other similarly sensitive area.

Further, the decision below appears to stand for the proposition that *any* legislative attempt, federal or state, to curtail forced bussing must fall, on the grounds that it would necessarily create an impermissible racial classification. Thus, the decision adds an element of confusion which lessens significantly the likelihood that the nation as a whole, or any state within it, will ever see implemented the neighborhood school assignment policy established by Congress in the Equal Educational Opportunities Act of 1974 (20 U.S.C. 1701, *et seq.*, and reaffirmed by the very initiative measure which is the subject of this appeal.

For the reasons set forth herein, it is extremely important to Washington's sister states that this Court now

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[1] The debate rages even on the academic level. See, *Bell,* Book Review, 92 H.L.R. 1826 (1979).

set this appeal down for full briefing and argument on its merits.

STATEMENT OF THE CASE

Initiative Measure No. 350, which as adopted by the voters of the state of Washington in 1978 by a margin of almost two-to-one, is not complex.[2] It begins, in §1, with a blanket prohibition of mandatory assignment of students away from their nearest or next nearest school:

> ". . . no . . . school district . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . ."

Three exceptions are then provided in §1. The prohibition does not apply:

> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

These exceptions, it will be observed, all focus upon the educational, health, and safety needs of the particular student, and the inability of a particular neighborhood school to meet those needs.

---

[2] The full text of Initiative 350 is set out at J.S.App. F-2 through F-4.

Sections 2, 3 and 4 further explain the terms and rules contained in §1. Section 5 makes it explicit that establishment of specialized enrichment programs and voluntary bussing for attendance at these programs, are in no way precluded.

Section 6 contains another important exception to the blanket prohibiton of mandatory bussing:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

The last section contains a standard severability clause, requiring that the invalidity of any provision of the Initiative, or the invalidity of its application to any person or circumstance, shall not affect the remainder of the Initiative, or its application to other persons or circumstances.

In a challenge brought by three school districts, the District Court invalidated the Initiative *in toto*, as applied to all of the some 300 school districts in the state. And the Court of Appeals affirmed the District Court, finding that the Initiative constituted, on its face, an impermissible racial classification.

There seems to be no dispute among the parties that the drafting and filing of the Initiative — the first steps in submitting it to the voters statewide — were prompted by the adoption, beginning with the 1978-79 school year, of a mandatory bussing program by the Seattle School District, designed to achieve greater racial balance in that District's schools.

The Initiative was approved, not only by a majority of the voters in the Seattle School District, but by a majority in every one of the State's 39 counties as well.

REASONS WHY THE FEDERAL QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

I. The Mandatory Bussing Question.

The major issue presented in this appeal is too important to be left in a state of legal confusion. If neither the voters nor their elected representatives have a role in resolving the debate over mandatory bussing of children away from their neighborhood schools, they should know why the Equal Protection Clause requires this result. If, on the other hand, such a result is not required, that too should be made clear.

The decisions of other lower courts on this issue simply cannot be reconciled with the decision of the Court of Appeals here. This appeal thus affords an important opportunity to dispel the confusion, and thereby take a significant step forward in the development of Equal Protection analysis.

A. The Differing Results In Several Recent Major Cases Involving Race-Connected Legislation Have Created Confusion As To The Legal Criteria For Determining Illicit Legislative Classifications, Thereby Heightening The Importance Of This Appeal.

At pages 19-21 of its jurisdictional statement, the State of Washington succinctly poses a critical question. As there pointed out, the specific language of the Washington Initiative is nearly identical to that used by Congress when it enacted the Equal Educational Opportunities Act of 1974 (20 U.S.C. §1701, *et seq.*) The federal statute is unquestionably intended to inhibit the use of forced bussing even where *de jure* segregation has been found to exist and there is a constitutional necessity to cure its effects. By contrast, the Washington State

legislation explicitly subordinates its own central policy to these same constitutional imperatives. Nevertheless, it is the federal statute which has been repeatedly upheld; while, ironically, it is the Washington law which has been, so far, declared unconstitutional. See, *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

In *Brown*, the Court of Appeals for the District of Columbia upheld the parallel federal legislation in the face of a broad-based constitutional challenge, never indicating at any point in its opinion that the legislation in question created some sort of racial classification. By way of contrast, the Ninth Circuit based its affirmance of the District Court decision in this case solely on the ground that the parallel state legislation constituted an improper racial classification under *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and *Lee* v. *Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970).

These differing results between circuits are confusing enough. The confusion is compounded, however, by the result reached in the recent case of *Crawford* v. *Board of Education of Los Angeles*, 113 Cal.App. 3d 633, 170 Cal.Rptr. 495 (1980), aff'd _____ Cal.App.3d _____, _____ Cal.Rptr. _____ (1981). In *Crawford*, California courts upheld a perfectly obvious attempt by the voters to inhibit the use of forced bussing to achieve racial balance in the absence of a federal constitutional requirement for doing so — precisely the same objective as was sought by the Washington voters here. The California voters did so by adopting a constitutional amendment expressly limiting state courts to the exercise of powers in school desegregation cases which are no greater than those exercisable by the federal courts in like circumstances. The measure in California was and still is simply an inhibition upon the power of one class

of state institutions — the state courts — to implement a program of forced bussing for the purpose of racially balancing California's public schools. Following the California Supreme Court's decision in *Crawford*, the school board in Los Angeles promptly dismantled that city's mandatory bussing program in response to the expressed will of the electorate. By contrast, a similar, large-scale bussing program goes on unimpeded today in Seattle, notwithstanding the expressed will of the electorate in Washington state.

Again, the importance of the question presented seems obvious. The States of Washington and California should be entitled to legislate equally in the area of school desegregation. So, too, should other states in the Union. Without a definitive resolution of this appeal, it will remain impossible for other states to determine the extent to which they are allowed to legislate in this field.

B. The Result Reached By The Court Of Appeals Is Based Upon A Fundamental Misconception As To The Proper Criteria For Determining An Unconstitutional Race-Dependent Decision.

The finding by the Court of Appeals that Initiative 350 constitutes an impermissible racial classification rests, we believe, upon a fundamental misconception as to what the Equal Protection Clause does and does not prohibit under the decisions of this Court. This misconception was succinctly stated by Judge Wright in his dissenting opinion.

> "The difficulty with the majority's analysis, supported in part by dictum in *Lee* v. *Nyquist*, . . . is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But 'racial' problems, such as school desegregation, must be dealt with in terms of the

> specific problem and specific solutions. The state does not create a classification on the basis of race in so doing." 633 F.2d at 1353.

Because the consequences of this confusion and misconception by the majority are so serious, the critical point made by Judge Wright merits further examination.

The Equal Protection Clause embodies, we believe what Professor Brest has called the "antidiscrimination principle."

> "Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct — at least when they selectively disadvantage the members of a minority group. By race-dependent, I mean decisions and conduct (hereafter, simply decisions) that would have been different but for the race of those benefited or disadvantaged by them. . . .[3]

The paradigm of a race-dependent decision is, of course, a statutory racial classification. Such a statute dictates, expressly, that there will be different results for members of different races, by reason of their race. Under such a classification, one's race determines what school one shall go to, what parks one shall use, what part of a bus one shall sit in, and so on. The causal relationship between race and result is thus embodied in the statute itself.

But there may well be race-dependent decisions which do not involve racial classifications at all. Although such decisions "would have been different but for the race of those benefited or disadvantaged by them"[4] the causal relationship between race and result is

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[3] P. Brest, *In Defense of the Antidiscrimination Principle*, 90 H.L.R. 1, 6 (1976).

[4] *Id.*

not found on the face of the statute itself, but must be found, at least in part, from facts and circumstances extrinsic to the statute. An example would be a statute shutting down all public schools, and thereby depriving all children, of all races, of a public education. If the purpose was to avoid racial integration, the decision embodied in the statute would be race-dependent. *Cf.*, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964). If, on the other hand, the decision was the result of the state simply running out of money, it would not be race-dependent.

As this last example shows, not all decisions that affect racial minorities — even disproportionately — are race-dependent. Although this was not clear before, it certainly became clear after such cases as *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

As these cases also show, determining whether a decision is race-dependent is not always easy. Determining whether the decision would have been different but for the race of the persons affected is especially difficult when the decision itself is the collective result of many individual decision-makers. But that it may be difficult does not mean that it is avoidable.

Does Initiative 350 embody a race-dependent decision? And even more importantly, what should a court look to in attempting to answer this question?

Does the face of the Initiative itself show a race-dependent decision, by reason of a racial classification? The Initiative surely makes an important classification, between those reasons which justify mandatory bussing and those which do not. The reasons which justify man-

datory bussing fall into two categories. In the first category are reasons which are directly related to the needs of the particular student, and the ability — or inability — of his nearest or next nearest school to meet those needs. See, §1(1)-(3). In the second category are the requirements of the federal constitution itself. See, §6.

All other reasons, under the Initiative, do not justify mandatory bussing. And among those reasons, of course, if the attainment of a greater racial balance when such balance is not constitutionally required. But this hardly indicates a racial classification on its face. Indeed, it indicates precisely the opposite, *i.e.*, an intent to adopt a policy that racial classifications will not be made in assigning children to schools.

The Initiative unquestionably is dealing with a racial problem — that of *de facto* segregation. But that, in itself, does not indicate any racial classification. Nor does that, in itself, mean that the decision is race-dependent. One must inquire further as to *why* the decision was made the way it was. That is the simple, but all-important point made by Judge Wright's dissent.

Three final points. First, unlike the city charter amendment involved in *Hunter* v. *Erickson,* 393 U.S. 385 (1969), Initiative 350 in no way impedes the efforts of minority groups to prevent private — or public — race-dependent decisions. The discussion in the Court's opinion in *Hunter*, however, may have been, at least in part, the source of the confusion for the Court of Appeals majority in this case. Although the Akron charter amendment did not constitute a racial classification, in the basic sense that different results were dictated for members of different races, the Court's discussion does

speak of the charter amendment as constituting a racial classification. See, 393 U.S. at 389-391.

But the result in *Hunter* is best explained and understood, we believe, in the terms used by Justice Harlan in his concurring opinion, in which he found the amendment invalid by reason of its ". . . clear *purpose* of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." (Emphasis supplied.) 393 U.S. at 395. And that, of course, was legislation which would prohibit race-dependent decisions by private parties in the sale or rental or housing.

Perhaps presaging the later clarification brought about by *Washington* v. *Davis,* Justice Harlan went directly to the question of intent or purpose, without casting his analysis in terms of a racial classification. And he thereby avoided the confusion into which the Court of Appeals majority was lead in its misplaced reliance upon *Hunter.*[5]

Secondly, in determining the validity of Initiative 350, then, there must inevitably be faced the issue which the Court of Appeals majority considered irrelevant, the issue of motivation or intent in adopting the Initiative. Was Initiative 350 a race-dependent decision? Specifical-

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[5] This is not the first time a lower court's reliance upon *Hunter* has been misplaced. In *Valtierra* v. *Housing Authority of San Jose,* 313 F.Supp. 1 (1970), a three-judge district court invalidated, squarely on the basis of *Hunter,* a California constitutional amendment requiring a local referendum on all low-income housing projects. This Court corrected the district court's error in *James* v. *Valtierra,* 402 U.S. 137 (1971). The present appeal affords an important opportunity to give a much needed clarification as to when lower courts should rely upon *Hunter,* on the one hand, and upon *Valtierra* on the other.

ly, did its adoption by the voters rest upon an intent to prevent minority groups from achieving a better education? Or, on the other hand, did it rest upon an intent to preserve the values inherent in a policy of neighborhood schools and upon a judgment that, on balance, mandatory bussing makes little sense educationally for *anyone,* and that accordingly any problem of racial imbalance should be handled by alternative means? In short, was Initiative 350 a race-dependent decision, which would have been made differently if minorities were not involved?

The fact that minorities *were* actually involved, and that the sponsors of the Initiative knew it would affect minorities does not make the decision embodied in Initiative 350 race-dependent. This fact only leads to the question of intent, but does not answer it.

In failing to address that issue of intent, the Court of Appeals' majority made its fundamental error. And the result of that error is what gives this appeal such great importance. The result, again, is that the voters of the state of Washington are precluded from resolving the debate over the wisdom of mandatory bussing, when that bussing is not constitutionally required. We do not believe that the Equal Protection Clause requires this result in the state of Washington or in any other state.

Lastly, the Court of Appeals went on at length in its opinion about the importance of "local control" over educational policy. See, 633 F.2d at 1345-47. The importance of "local control" has also been alluded to in numerous other federal court decisions, including those of this very court. See, *e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). What is so anomolous about the Court of Appeals' decision here is that, while it emphasizes the importance of local control

(and, perforce, the impropriety of "state" interference with that local control), it ignores the fact that passage of the Washington Initiative represents the most direct local control possible. The exercise of the legislative power through popular initiative *is* local control. By its very terms, the Washington initiative is a flat directive by those vitally concerned with the education of Washington's children — parents of those children and tax-paying residents in local school districts — to Washington school districts telling local school officials how they are to go about assigning students in the absence of a constitutional duty to cure intentional racial segregation. The Court of Appeals has chosen, instead, to characterize these same concerned citizens as "the state," an impersonal political entity interfering in "local" educational matters. That is an absurd characterization which emphasizes the importance of meaningful review by this Court.

II. The Awarding of Attorneys' Fees to Political Subdivisions of the States is of Vital Concern to Amici States and Merits This Court's Plenary Review.

It takes very little effort to appreciate readily the concern of amici over the Circuit Court's treatment of attorneys' fees in this case. The District Court found that this very litigation had already been largely funded by the State of Washington, yet the panel majority held that Court's refusal to order the replenishment, by the state, of *its* funds appropriated to one of *its* political subdivisions for the very purpose of conducting this litigation was "arbitrary and capricious."[6]

---

[6] It is important to note here that *only* the school districts themselves, which possess no Fourteenth Amendment rights per se, plus several intervenors whose right to fees are apparently not involved in this appeal, even requested fee awards. No fees were

A greater lack of sensitivity for the states' relationships to their own agencies and subdivisions, and for the integrity of states' legislative appropriation processes, can hardly be imagined. Surely a rule which requires, as a matter of federal law, a state to pay *twice* for litigation which it has, in effect, permitted one of its own political subdivisions (which it has created, funded and empowered to sue) to bring against that state constitutes such an "unwarranted interference in the state's ability to function effectively in a federal system" (see, *National League of Cities* v. *Usery,* 426 U.S. 833 (1976)) that Congress cannot be presumed to have implicitly intended such a result, even in the context of enforcing the Fourteenth Amendment.

The proper disposition of the attorneys' fees issue is of vital importance to all the states. Amici strongly urge this Court to note probable jurisdiction and set that question down for full briefing and argument on the merits.

---

sought on behalf of the several private plaintiffs also nominally represented by the school districts' attorneys.

CONCLUSION

The questions raised by the State of Washington are of vital concern to the amici states. Probable jurisdiction should be noted.

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No. 81-9

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

I.

Absent any constitutional duty on the part of a local school board to implement a racially-oriented mandatory bussing program, once such a program is underway, may it ever be discontinued without violating the Fourteenth Amendment?

II.

Once a racially-oriented mandatory bussing program has begun in a non-segregated school district, may the preexisting racially-neutral neighborhood school assignment policy be restored by the local school board which abandoned it, or may it be restored by the superior legislative authority of the state through enactment of a law applicable to all local school districts?

III.

Does a state statute which does not explicitly use race as a criterion nevertheless create an impermissible racial classification solely because it addresses specifically a subject which has a racial nexus?

IV.

Does statutory restoration of a neighborhood school assignment policy constitute racially discriminatory state action when accomplished in response to a mandatory bussing program designed to achieve a particular level of racial distribution of public school students deemed to be desirable by a local school board?

V.

Where record evidence shows nondiscriminatory intent on the part of voters adopting a state-wide initiative, does a district court err in finding that the legislation was motivated by an intent to discriminate on racial grounds while refusing even to consider such evidence?

VI.

Where a state statute is modeled closely on a federal

statute explicitly intended to foster a national policy in favor of neighborhood school assignment of public school students and to inhibit the use of mandatory bussing to achieve racial distribution in public schools, is there a recognized constitutional ground for upholding the federal law while striking down the state law?

VII.

Where state officials involved in implementing a state law interpret it in a manner which eliminates a particular constitutional inquiry, is it error for a federal court to interpret that law in a contrary manner, rendering it constitutionally suspect?

VIII.

(A) Are political subdivisions of a state, such as school districts, within the ambit of 20 U.S.C. § 3205 and 42 U.S.C. § 1988, so as to entitle them to attorneys' fees when they prevail in suits against the state?

(B) If political subdivisions are so entitled, does a district court abuse its discretion under those statutes by refusing to order a state to pay the attorneys' fees of school district plaintiffs upon a finding that the district's prosecution of the litigation has already been funded by that state?

PARTIES TO THESE PROCEEDINGS

All of the numerous parties of record to these proceedings are listed in footnote 2 and Appendix D to the Jurisdictional Statement (J.S. 1; J.S. D-1 through D-3), and for the sake of brevity are not reprinted herein.

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No. 81-9

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SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Memorandum Opinion of the U.S. District Court for the Western District of Washington, entered on June 15, 1979 are reported at 473 F.Supp 966 (J.S. A-1 through A-36). The Declaratory Judgment and Permanent Injunction entered by the District Court, is reprinted at J.A. 8-9. The District Court's Order Denying Attorneys' Fees is reprinted at J.S. C-1 through C-4. The December 16, 1980 opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit is reported at 633 F.2d 1338 (J.S. B-1 through B-29).

JURISDICTION

This appeal is primarily taken from a judgment of the Court of Appeals for the Ninth Circuit upholding a decision of the U.S. District Court for the Western District of Washington declaring invalid a Washington state statute, Initiative Measure No. 350 (now codified as chapter 28A.26 RCW), as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appeal is also taken from the Ninth Circuit's reversal of the District Court's denial of awards of attorneys' fees to the original plaintiff school districts and intervenors.

The Court of Appeals filed majority and dissenting opinions on December 16, 1980. A timely filed Petition for Rehearing and Suggestion for En Banc Determination was thereafter denied on March 26, 1981. (J.S. E-1).

Appeal is now taken to this Court pursuant to 28 U.S.C. § 1254(2). A copy of the Notice of Appeal was filed with the Clerk of the Ninth Circuit on May 18, 1981. (J.S. D-1 through D-6).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

United States Constitution, Fourteenth Amendment (Equal Protection Clause).

Washington State Constitution, Article IX.

Initiative Measure No. 350 (now codified as chapter 28A.26, Revised Code of Washington).

20 U.S.C. 1701, *et seq.*, Equal Educational Opportunities Act of 1974).

42 U.S.C. 1988 (1976 Civil Rights Attorneys' Fees Award Act).

20 U.S.C. 3205 (allowing awards of attorneys' fees in certain educational cases).

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[1]These constitutional and statutory provisions are set out in full in the Jurisdictional Statement (J.S. F-1 through F-18).

STATEMENT OF THE CASE

1. The Historical Legal Background.

The Washington Constitution, adopted in 1889, has always provided in Article IX, § 1 that:

> "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The state has historically fulfilled this constitutional duty through a comprehensive legislative scheme authorizing the creation of local school districts empowered by the legislature to do those things necessary to educate Washington's children. *See*, generally, Title 28A RCW; *see*, in particular, chapter 28A.57 RCW and chapter 28A.58 RCW.

In accordance with Article IX, § 1, *supra*, the State of Washington has always operated a unitary public school system. To date, no Washington school district has ever been judicially declared to have engaged in racial segregation in violation of the Fourteenth Amendment in the assignment of students in Washington's public schools. Moreover, the state legislature has consistently protected and enhanced the exercise of civil rights by all persons within the state.[2]

---

[2]The creation of a comprehensive scheme of civil rights law began a full five years before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The statutory provisions include: RCW 9.91.010 (making it a misdemeanor to deny the full enjoyment of any public facilities by acts "directly or indirectly" causing persons of any race to be treated as not welcome); RCW 18.85.230 (prohibiting discrimination in hiring or sales activity by real estate workers and salesmen); RCW 28A.02.050 (prohibiting discrimination by any school district in employment; RCW 3.80.040 and RCW 35.81.170 (prohibiting discrimination in "urban renewal" projects); RCW 41.14.180 (prohibiting discrimination in appointments and promotions in county sheriff's offices); RCW 43.01.100 (prohibiting questions relative to any applicant's race on any application for employment in state government); chapter 49.04 RCW (providing for affirmative action improving minority race representation in trade apprenticeships). RCW 49.60.176 (prohibiting racial discrimination in credit transactions); RCW 49.60.178 (prohibiting racial discrimination in insurance transactions); RCW 49.60.180 (prohibiting racial discrimination in labor union practices); RCW 49.60.200 (prohibiting racial discrimination in employment

2. The Recent Developments Which Precipitated The Filing Of This Action.

The Seattle School District is the largest of Washington's 300 school districts. At the time of trial the District had a total student enrollment of approximately 54,000, of which 37.3% were identified as minority students. (Finding of Fact 1.1; J.S. A-1).

In early 1977, the Seattle School Board, by resolution, established criteria for determining whether a given school within the District was "racially imbalanced." Racial imbalance was defined by the board's resolution as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body." (Finding of Fact 6.9; J.S. A-17; J.A. 8).

The District thereafter developed a mandatory bussing program designed to eliminate any racial distribution of students in Seattle schools which did not conform to this standard.

When the final version of this bussing program was decided upon and scheduled to commence in the 1978-79 school year, opponents of the plan first attempted to enjoin its implementation in state court. Failing to do so, they then drafted, filed, solicited signatures for and campaigned for passage of Initiative Measure No. 350 at the 1978 General Election. The initiative was placed on the ballot and approved by the voters in each of Washington's 39 counties at that election.

Initiative Measure No. 350 provides in § 1 (now codified as RCW 28A.26.010) that:[3]

> "* * * no * * * school district * * * shall directly or indirectly require any student to attend a school other than the school which is geographically

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agency practices); RCW 49.60.215 (prohibiting racial discrimination in amusement); and RCW 49.60.222 (prohibiting racial discrimination in real estate transactions).

[3]The full text of the law is reprinted at J.S. F-2 through F-4.

> nearest or next nearest the student's place of residence * * *"

The following exceptions are then carved out of this central policy:

> "* * *
>
> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's pace of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

An additional exception is embodied in § 6 (RCW 28A.26.060) as follows:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

From the outset of this litigation the state has consistently interpreted this section to allow any Washington school district to assign students away from their neighborhood schools where the state or federal constitution requires such assignment. The Attorney General continues to adhere to this interpretation.

3. Race-Conscious Programs In The Pasco And Tacoma School Districts Which Form The Basis For Involvement By Those Districts.

Aside from the Seattle School District, the Pasco and Tacoma School Districts are the only other Washington school districts which operate programs designed to alter and control racial distribution of students in their public schools.

The Pasco School District operates a one-way bussing program which it first implemented in 1965 when it closed its one predominantly-black elementary school, thereafter

bussing minority students from the so-called East Pasco area of that District to other schools in the District located outside this neighborhood. (Finding of Fact 4.3; J.S. A-9).

The Tacoma School District has no mandatory bussing program. Instead, it operates a voluntary "magnet" program at two of its schools, thereby maintaining acceptable racial distribution of students throughout the entire District. The District also adheres to an "open enrollment" policy which allows any student within the District to attend the school of his or her choice, subject to practical limitations, using the Tacoma transit system. (Findings of Fact 5.1 through 5.16; J.S. A-10 through A-14).

4. The Procedural History Of This Case.

The Seattle, Tacoma and Pasco School Districts, joined by a number of individual plaintiffs, filed the initial complaint herein on November 30, 1978. The state defendants agreed to the entry of a temporary restraining order staying implementation of the newly-enacted law pending a hearing. On February 9, 1979, the District Court, after hearing, entered a preliminary injunction and, at the same time, allowed intervention by several other parties plaintiff. The principal complaint in intervention (filed by the so-called "Seattle Intervening Plaintiffs") alleges that, regardless of the constitutionality of Initiative Measure No. 350, it cannot be applied to the Seattle School District since that District has committed past acts of *de jure* segregation. The District Court ordered that the constitutionality of the initiative (*i.e.*, on its face or as applied generally) would be taken up first ("Phase I"). It further directed that "Phase II" of the proceedings, if necessary, will be addressed to the question of whether or not the law may constitutionally be applied in any given case (*i.e.*, whether or not *de jure* segregation exists so as to preclude its application).

Trial of the so-called "Phase I" issues was held in late April and early May, 1979. On June 15, 1979, the District Court entered findings of fact and conclusions of law accompanied by a memorandum opinion. Entry of

judgment was delayed pending disposition of requests for awards of attorneys' fees. On August 29, 1979, the District Court entered its final declaratory judgment, stating, in part, as follows:

> "* * * Initiative 350 is declared unconstitutional in that it denies equal protection of the law to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:
>
> "(a) It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race. No compelling state interest justifies that racial classification.
>
> "(b) A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative.
>
> "(c) It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation." (J.A. 8).

A Ninth Circuit panel majority affirmed the District Court, though on a limited basis, saying:

> "We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. *Hunter v. Erickson*, * * * *Lee v. Nyquist*, * * *" (J.S. B-4).

SUMMARY OF ARGUMENT

Clearly, a state may not maintain a neighborhood school policy as a means (for the purpose) of keeping its schools racially segregated. For that would itself be *de jure* segregation. And in such case bussing could be required — and implemented — without violating Initiative 350. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

There are also, however, demonstrably good reasons for neighborhood schools — reasons which have made

such schools an almost universal tradition throughout not only the state of Washington but the entire nation.

Initiative 350 simply says, therefore, as a matter of state policy to local school districts:

"We the people of this state, exercising our reserved legislative authority under the state Constitution, want you to retain a neighborhood school policy,[4] as a general matter (with exceptions for special education, physical conditions, etc.) until such time as it is determined that *de jure* segregation exists.

This directive, we urge, is not unconstitutional under the Fourteenth Amendment — any more than is the similar directive of Congress under the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701, *et seq.*, discussed below) unconstitutional under the Fifth Amendment. It does not run afoul of either *Hunter v. Erickson*, 393 U.S. 385 (1969) or *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y., 1970), aff'd 402 U.S. 935 (1971) upon which both courts below erroneously relied. Its passage does not manifest a collective intent to engage in racial discrimination under the test laid down by this court in *Washington v. Davis*, 436 U.S. 229 (1976), and its progeny. It in no way stands as an unconstitutional state barrier to the elimination of *de jure* segregation if such should be found, in any school district, to exist.

Therefore, the ruling below, holding Initiative 350 unconstitutional on its face, should be reversed.

The Court of Appeals also erred, and abused its own discretion, in reversing the District Court and awarding attorneys' fees to the three school districts. Its opinion amounts to an approval of "double dipping" by public agencies, as well as an unwarranted intrusion into the internal appropriation process of the state. As public agencies, rather than private litigants, the school districts do

---

[4]By neighborhood school policy, we here mean—as did the framers of Initiative 350—a policy which, as a general proposition, allows all students desiring to remain in their own neighborhood schools (nearest or next nearest) to do so while, at the same time, permitting local school administrators to provide for attendance elsewhere on a strictly voluntary basis.

not even fall within the ambit of the attorneys' fee acts, which were intended to foster private enforcement of the civil rights laws.

ARGUMENT

I. THE DECISIONS IN *HUNTER V. ERICKSON* AND *LEE V. NYQUIST* DO NOT CONTROL THE DISPOSITION OF THIS APPEAL

The respective opinions of the District Court and the Ninth Circuit make it quite clear that both of the Courts below regarded the decisions of this Court in *Hunter v. Erickson* and *Lee v. Nyquist* to be dispositive of this case. In so doing, they seriously erred.

A. Prefatory Comments:

Some preliminary points should be noted. The oft-repeated statement that Initiative 350 "* * * forbids mandatory student assignments for racial reasons" while "* * * permitting such assignments for purposes unrelated to race" is, quite simply, incorrect. This statement both overstates and understates what the initiative actually does. First, the initiative does not prohibit all mandatory student assignments for racial reasons; it does, however, severely limit such assignments (*i.e.*, to those schools nearest and next nearest to the student's home). This point is important for a very obvious reason: If the purpose of Initiative 350 had been to prevent any increased racial balance in the schools, it certainly failed to accomplish that purpose, for it allowed mandatory assignments to the next nearest school for *any* purpose, including the achievement of greater racial balance. This is, we suggest, a strong indication that the purpose of Initiative 350 was not to prevent increased racial balance at all.

Second, the types of mandatory assignments which the initiative does in fact restrict are not confined to mandatory assignments for the purpose of achieving greater racial balance. The initiative limits mandatory assignments away from the nearest or next nearest school

except for the reasons stated in § 1(1) through (3) and § 6 of the initiative. And those exceptions *all* focus in § 1(1) through (3) on the educational, health, and safety needs of the particular students, and the inability of a particular neighborhood school to meet those needs.[5]

Reasons stemming from administrative convenience, such as the desire to fill up empty classrooms at the opposite end of a school district, the desire to achieve a balanced classroom size between the various schools in the district, either to accommodate the teaching staff or for any other reason, the desire to obtain more transportation money from the state; all these provide no escape from the initiative's limitation.[6]

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[5]Again the three exceptions are as follows:

"(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

"(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

"(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

[6]The District Court's Finding of Fact No. 8.3 was that "[e]xcept for racial balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for *most*, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools (emphasis added)." (J.S. A-24). This Finding was specifically footnoted by the Ninth Circuit. (J.S. B-6).

The retained limitation on forced bussing to achieve balanced classroom sizes and school enrollments is, alone, quite significant. Newspaper accounts on both sides of the state just prior to the 1978 general election detailed instances of vocal opposition (by both school district officials and parents) to mandatory bussing of school children for purposes entirely unrelated to race. (Exs. A-130 and 117, Tr. 574, 937). Indeed, in the Spokane School District, a citizens committee was officially established to devise methods to prevent any necessity for bussing school children to accommodate anticipated population shifts within the district, a development which has nothing to do with race. Tr. 930-943.

Other forms of racially-unrelated extra-neighborhood bussing restricted by the Initiative are referred to, for example, in the concerns expressed by the Seattle School District's own attorneys several months prior to the 1978 General Election (Ex. A-9, Tr. 160):

The Initiative as drawn will affect more than just the Seattle

With these major features of the Initiative in mind, we turn to *Hunter* and *Lee*, to see if they are controlling.

B. The Essence Of Initiative 350 Differs Greatly From The Laws Struck Down In Hunter And Lee.

In *Hunter* the electorate in the City of Akron amended the charter of that city to provide that any ordinance enacted by the city council dealing with racial, religious or ancestral discrimination in housing would not become effective unless approved by a majority of the city voters. The charter imposed this requirement of voter approval upon no other type of ordinance. Indeed, housing ordinances dealing with issues other than discrimination in sales or rentals remained effective merely upon appraisal by the city council, just as before.

This Court found the amendment to be a denial of equal protection in that it created an explicitly racial classification, treating racial discrimination in housing differently from other matters relating to housing.

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the

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School District. Many school districts in the state transport students beyond their next nearest school for various reasons including the desire to receive increased transportation funds from the state.

The arguments contained in the official voters pamphlet sent to all registered voters in the state prior to the 1978 General Election (Ex. 2, Tr. 23) likewise referred to other forms of non race-related bussing effected by the Initiative:

> 350 prohibits assignment of students outside their district; thus, it would restrict interdistrict cooperative programs.
>
> 350 would in some cases prohibit changing the grades offered in particular schools, such as converting some three-year to four-year high schools. It would prohibit most disciplinary transfers and the redrawing of school boundary lines to make efficient use of buildings. It would mean costly interference with location of special education programs.

> ballot, * * * [*the referendum provision*] *places special burdens on racial minorities within the governmental process.* * * *" 393 U.S. 385, 391 (Emphasis added.)

The obvious purpose of the ordinance was, quite simply, to place a new legal obstacle in the way of the efforts of minority groups to utilize the political process to assure them freedom of choice as to where they might live. As the Court pointed out, the majority already had that freedom of choice, and thus needed "no protection against discrimination." And the ordinance created an express racial classification by explicitly focusing on — and impeding — the efforts of minorities to avoid discrimination in housing.

Initiative 350 creates no such express racial classification. Again, it prohibits mandatory assignments outside the limits of the student's nearest or next nearest school for *any* reason, unless related to the particular student's particular needs. Further, within the geographical limits of the nearest or next nearest school, mandatory assignments for *any* reason are permitted, even for purposes of achieving greater racial balance.

The true basis for *Hunter*, it is also important to note, was emphasized in *James v. Valtierra*, 402 U.S. 137 (1971), where this Court upheld a California referendum amending that state's constitution to provide that no low-rent housing projects could be developed, constructed, or acquired until the project was approved by a majority of those voting at a community election. In reversing the lower court the Court said, at 402 U.S. 140-141:

> The court below erred in relying on Hunter to invalidate Article XXXIV. Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." * * *
>
> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." * * * The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here

> would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. * * * The present case could be affirmed only be extending Hunter, and this we decline to do. (Citations omitted)

Like the district court in *Valtierra*, the lower courts in this case have examined a statute which was racially neutral on its face and determined that a racial classification was necessarily implied. The Court of Appeals then presumed that this implied classification was constitutionally invalid, and ended the analysis right there. No consideration of intent was needed. By extending *Hunter* and avoiding the required inquiry into intent, the lower court has effected a major shift in equal protection analysis.

In *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), a three-judge court applied *Hunter* in striking down a New York statute which provided as follows:

> "Except with the express approval of a board of education * * * a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race * * *

Citing *Hunter*, the District Court stated at 318 F.Supp. 719:

> "The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters * * *"

This Court, of course, affirmed the thee-judge Court's decision in *Lee*. 402 U.S. 935 (1971).

Unlike Initiative 350, the statute involved in *Lee* did not represent a legislative decision that *all* mandatory assignments were to be limited unless the needs of the particular student required it. Under that statute, every student in the district could be required to go anywhere in the district, and the concept of the neighborhood school could thereby be completely eliminated — *for any reason whatsoever save race*. The purpose of the statute, in short, was not to prohibit extra-neighborhood mandatory assignments; rather, its express terms show that its purpose was

to prohibit only racial transfers. Racial balance was bad; every other reason for mandatory assignments was good.

This critical point is made quite emphatically by the District Court's opinion in *Lee*.

> "Defendants content that the sole purpose of the statute was to give local boards, directly responsible to the people, control over the methods for achieving racial balance. The statute's salutary objective, they urge, was to assure the community acceptance necessary for the effectuation of local school desegregation. *To the extent, however, that the statute thus recognizes and accedes to local racial hostility, the existence of which has created in the past a serious obstacle to the elimination of de facto segregation, the purpose is clearly an impermissible one.* 318 F.Supp. at 719, 720. (Emphasis supplied.)

Observe, in this regard, that the ban on extra-neighborhood mandatory assignments prohibited assignments even to the next nearest school. Increased racial balance to *any* extent was the target of the statute. And observe further, in this regard, that the ban applied only in districts where the majority of the school board was *not* elected, *i.e*, in those districts in which the "local racial hostility" to increased racial balance could not exercise control on the local level.

Unlike Initiative 350 the statute in Lee, in short, did not involve any affirmation of an otherwise constitutionally permissible public policy. It simply embodied a rifle shot prohibition of racial bussing. That is the critical difference here, and the reason Initiative 350 should be upheld.

C. There Are No Burdens Imposed On Minorities By Initiative 350 In Washington School Districts.

Though *Hunter* and *Lee* are distinguishable, as shown, the broad question raised by *Hunter* nevertheless requires further examination. Does the Initiative impose "special burdens on racial minorities within the governmental process"?

Initially, it seems manifest that no "special burden" is

imposed on anyone in particular in those 297 Washington school districts where few, if any, extra-neighborhood assignments are presently being made for any purpose. Many of these districts have only one school facility serving students at a given grade level. And, in particular, it cannot be said that a "special burden" is somehow imposed upon minority students in those several Washington school districts having five or more schools which are already racially balanced on a school-by-school basis through simple application of Washington's traditional neighborhood school assignment policy, and which have minority enrollments in excess of the statewide average.[7]

Even as to the three school districts which are parties to this appeal, however, it is simply impossible to define and articulate any "special burden" imposed on minorities in those districts.

1. No Burdens Are Imposed On Minorities In The Pasco School District.

Consider, first, the situation in the Pasco School District. Ironically, the effect of Initiative 350 when implemented in Pasco will be entirely salutary because it will actually require discontinuance of invidious racial discrimination which has occurred and which continues to occur there.

The situation in the Pasco School District is markedly similar to that dealt with by the Sixth Circuit in *NAACP v. Lansing*, 559 F.2d 1042 (6th Cir. 1977), where the Court pointed out at 559 F.2d 1052:

> "* * * Of the total black enrollment in Lansing elementary schools, 77% of the students attended * * * four schools. The Board of Education's response to the increasing segregation in the elementary school system furnishes additional indicia of de jure segregation. * * * The integration effort was accomplished by phasing out and closing the predominantly black schools, * * * and transporting the pupils to outlying white schools. The District Court

[7] *See*, Ex. A-93(g) for school-by-school minority enrollments in the following school districts: Prosser, Grandview, Sunnyside, Toppenish, Wapato, Moses Lake, Quincy and Clover Park.

> found that 'the "one-way busing" program adopted by the Lansing Board of Education caused the burden of desegregation to fall disproportionately on Blacks. It also had the effect of keeping the "neighborhood school policy" a reality for Whites, while making it chimerical for Blacks.' * * * We therefore affirm the District Court's finding that the one-way busing of black children beginning in 1965 and continuing to the present, without a corresponding effort to spread the burden of integration more equitably through the system, is an act of de jure segregation."

If anything, though, the situation in the Pasco School District is worse than that which the Sixth Circuit found deplorable in Lansing. Minority parents in East Pasco initially refused to volunteer their kindergarten children to attend the newly-opened Livingston Elementary School (a predominantly White school far removed from the East Pasco area) and the District found it necessary to adopt a regulation *requiring* those minority kindergarten children to attend that school. (J.A. 30-31). Dr. Childers then reinforced the fact that these sentiments still exist when he pointed out that if Initiative 350 is allowed to be implemented in the Pasco School District, minority students in the East Pasco School District area would opt to attend those two or three schools which are closest to their neighborhood. (J.A. 53).

The terrible irony here, then, is that the Pasco School District has historically implemented the central policy of Initiative 350 for its white students and their parents, but, since 1965, it has denied it to minorities. In light of these considerations, the School District's posture before this Court smacks of utter hypocrisy. Implementation of Initiative 350 in Pasco will rescind those policies and practices which have, for years, manipulated unwilling minority students. Thus, based on the evidence presented at trial, it seems absurd to suggest that a "special burden" would be imposed on minorities in Pasco by Initiative 350. In fact, the initiative will force removal of "special burdens" already imposed on minorities in Pasco by the School District itself and permit mandatory bussing of majority students, to their next-nearest school.

2. No Burdens Are Imposed On Minorities In The Tacoma School District.

Any suggestion that special burdens will be imposed on minorities in the Tacoma School District by Initiative 350 is also amiss. Initiative 350 will simply have no impact whatsoever on that District's well-established and successful voluntary magnet school program.

The Tacoma School District's magnet school program consists, in essence, of special enriched academic opportunities offered to students who enroll at two of its elementary schools, Stanley and McCarver. These two schools are located in a predominantly minority-populated neighborhood. The manifest purpose of the program is to attract majority students to those two schools in sufficient numbers to achieve a desired level of racial distribution.

Because of the success of its voluntary magnet school program, though, the Tacoma School District has been forced to maintain a sizable waiting list of students who desire to attend one or the other of these two schools. At the time of trial, this list included 70 students who resided in zones which could be described as "nearest" or "next nearest" to one or the other of the two schools. Since the School District has refused to assign such students to either Stanley or McCarver (because to do so would upset the racial distribution in those two schools), its contention in this litigation has been that implementation of Initiative 350 in Tacoma will *require it* to assign them to one or the other of those schools, thereby disrupting the entire magnet school program and, ultimately, the entire District program for maintaining racial balance in Tacoma's schools.

There is a simple solution to the problem posed by the Tacoma School District, however. The solution is to be derived from the provisions of Initiative 350 itself.

The language of § 5 of Initiative 350 specifically disavows any legislative intent to interfere with operation of programs such as those at Stanley and McCarver Elementary Schools, by stating that:

> "The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or

> enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students."

Beyond this though, there is another, more technical reason why Initiative 350 would not, by its own terms, interfere with the District's program. In its operation of the magnet school program, the District has necessarily established reasonable enrollment ceilings — using the race of the students involved as the criterion — which enable those magnet programs to achieve the desired result. The District can legitimately respond to objections raised by minority students who deem themselves deprived of their neighborhood school by pointing out that the nearest and next-nearest schools (*i.e.*, Stanley and McCarver Elementary Schools) would be rendered overcrowded within the meaning of § 1(3) of Initiative 350 if those students were assigned to either of those schools.

It should also be emphasized here that Dr. Eugene Tone, the sole witness called at trial by the Tacoma School District, testified that as many as 95% of the parents of school children with whom he comes into contact — majority and minority — favor a neighborhood school assignment policy (meaning, to them, assignment of public school students to the school closest to their place of residence). (J.A. 20-21; Tr. 392).

Initiative 350 thus imposes no "special burdens" on minorities in Tacoma. By its own terms, Initiative 350 simply has no impact at all on the Tacoma School District's successful voluntary program to maintain a desired racial balance of students in its public schools.

3. No Burdens Are Imposed On Minorities In The Seattle School District.

There is simply no question, of course, that Initiative 350 will drastically curtail further implementation of the Seattle School District's mandatory bussing program. But is even that a "special burden" within the meaning of *Hunter* and *Valtierra*? The answer is no!

In the first place, it is *analytically* impossible to define any "special burden" imposed by Initiative 350 in

the Seattle School District. The so-called Seattle Plan itself recites that it is "* * * equitable for both minority and non-minority families." Thus, the program itself has equitably distributed its burdens between minority and non-minority students and their families. The impact of Initiative 350 in Seattle — to the extent that it rescinds the mandatory extra-neighborhood assignment portion of the Seattle Plan — is thus proportional to those burdens "equitably" imposed on both minority and majority students and parents in the first place. Logically, then, it is impossible to define a "special" burden imposed on minorities by removing those burdens previously imposed by the District.

In more practical terms, though, this absence of any "special burden" imposed by Initiative 350 on minorities in the Seattle School District is graphically illustrated by the testimony of the Seattle School District Superintendent, Dr. David Moberly, who, like his counterparts in the Pasco and Tacoma School Districts, made it clear that minorities in the Seattle School District are not burdened in any sense by a statute which would require Washington school districts to adhere to a neighborhood school assignment policy:

> "A. * * * we have large numbers of minorities * * * opposed to desegregation. The Asian community, as I go out, I had concerns voiced about desegregation. I think, publicly, we have seen, recently, minorities at our Board meetings opposing desegregation * * * I think it is a false assumption on all of our parts to assume that only the majorities are opposed to desegregation. I think the population is mixed out there in viewpoints on it.
>
> "Q. When you say that they are opposed to desegregation, is that to desegregation as a whole or is this to the desegregation efforts, the mandatory aspects of desegregation?
>
> "A. I think the mandatory efforts, in other words, "busing." I haven't found anybody that really loves it.
>
> "Q. They go along with the idea of desegregation, but not forcing them onto a bus?
>
> "A. Not by busing. If you get out in your Asian community, your Black community, you will find alot

of opposition to it. It's not a popular thing." (J.A. 70-71).

The vote on Initiative 350 at the 1978 general election certainly bears out Dr. Moberly's personal experience. In the predominantly minority 37th legislative district in Seattle (one of only two legislative districts in the state where Initiative 350 did not receive the majority of votes), roughly 40% of the vote cast was in *favor* of the measure. (Ex. 105; Tr. 774). This vote followed a local opinion survey, taken earlier in 1978, which showed that roughly two-thirds of Seattle-area minorites opposed suggested mandatory bussing in Seattle. (Ex. 137; Tr. 2011).

We are not here suggesting that minorities consider an education in a racially imbalanced school to be better than, or even as good as, an education in a racially balanced school. *Rather, we are suggesting that they want the freedom to make that decision themselves, on an individual family-by-family basis.* That is precisely what Initiative 350 affords them; and that, we suggest, hardly constitutes the imposition of a special burden upon them. The evidence we have just described is relevant because it simply highlights this point.

To look at the matter from a somewhat different perspective: The critical issue in this case is not whether the Seattle School Board was right or wrong in believing that greater racial balance in a school — however that might be defined — "results" in a "better" education — however that too might be defined. Initiative 350 does not attempt to resolve that debate at all. Rather, it leaves the debate to be resolved on the family level. If a minority student believes that a better education can be obtained elsewhere than in his neighborhood school, Initiative 350 leaves the District free to allow that student to attend that other school. Indeed, this is happening very successfully in Tacoma. If, on the other hand, the minority student wants to stay in his or her neighborhood school, that option too is made available. Only the most condescending sort of paternalism can justify characterizing this as a "special burden."

D. In Investigating Whether Initiative 350 Somehow Imposes Special Burdens On Minorities In The Governmental Process, It Must Be Emphasized That Washington's Constitution Makes It The Responsibility Of The State — Not The Local School District — To Provide For The Education Of School Children.

The question whether Initiative 350 imposes special burdens on minorities within the governmental process has another aspect which must be examined.

The Ninth Circuit panel majority's opinion makes repeated reference to what it refers to as "traditional local authority" over educational policies (J.S. B-7), and finds that the initiative unconstitutionally overturns this authority.

The problem with that portion of the opinion, however, is that while the traditional *national* pattern may be as there described, that description has little to do with the relationship of local and state educational authorities in Washington State. Ironically, it was, in major part, the same group of plaintiff-appellees who sued many of the same defendant-appellants in December, 1975, claiming that the *state* had defaulted in *its* duty to "provide for a *general and uniform system* of public schools" pursuant to Article IX, § 2, of the Washington Constitution. In turn, the Washington Supreme Court agreed with that proposition. See, *Seattle School District No. 1, et al. v. State of Washington, et al.*, 90 Wn.2d 476, 585 P.2d 71 (1978).

The State Supreme Court there said:

> "* * *
>
> "The findings of fact demonstrate that Seattle School District No. 1 (District) must provide an educational program that complies with State statutes, regulations of the State Board of Education and the Superintendent of Public Instruction. * * *
>
> "* * * Moreover, the trial court declared that it is the duty of the Legislature to fully implement Const. art. 9 §§ 1 and 2, and to that end it is to: (A) define 'basic education' and determine the substantive content of the 'basic program of education'; and (B) provide for the fully sufficient and ample funding of

> the program by appropriation *or* through regular and dependable tax sources." (90 Wn.2d 476, 485-87).

In view of this decision, it will readily be seen that, in Washington, policy decisions regarding the operation of the state public school system, including the funding of *direct costs for school transportation, must* be made at the *state* and not the *local* level.

The simple fact is this. As a result of Seattle School District's successful suit against the State, the legislature in 1977 — in response to the trial court decision — *took into its own hands every basic policy decision regarding the operation of the public school (K-12) system* in the State of Washington, save one! It did not address the issues involved in Initiative 350. See, chapter 359, Laws of 1977, 1st Ex. Sess. (Basic Education Act of 1977) and chapter 325, Laws of 1977, 1st Ex. Sess. (Levy Lid Act). See, also, §§ 94, 96 and 97, chapter 339, Laws of 1977, 1st Ex. Sess. (Budget Act).

The amount of funding each school district will receive, from the State and from local sources as well, is controlled by the legislature. Effectively, the legislature controls also the average salary levels of school district staff and the staff/student ratios. Further, course offerings, in terms of both content and numbers of hours for various grade levels, are legislatively mandated. The number of hours the teacher must spend in the classroom is set by the legislature. The result of Seattle School District's victory was to have the legislature remove from its board — and from all other school boards in the State — the last major elements of "local control." Accordingly when the voters adopted Initiative 350 in 1978, they were simply following this pattern established in the prior year.

Thus, the Court of Appeals majority's suggestion that Initiative 350 amounted to a "radical restructuring" of the political process in Washington was simply wrong. The point deserving emphasis here, of course, is that there can really be no serious contention that the Washington governmental process has been skewed in a manner which imposes special burdens on minorities. The State has merely imposed statutory limits on the powers of its local

school districts (districts which would not exist but for the legislative charter granted them by the state legislature).

E. The Later Decisions Of This Court In Washington v. Davis, Village Of Arlington Heights v. Metroplitan Housing Development Corp., And Personnel Administrator Of Massachusetts v. Feeney Suggest That The Facial Analysis Employed In Hunter And Lee Is No Longer The Correct Approach To Be Taken.

Having concluded our examination of the analytical underpinnings of the decisions in *Hunter* and *Lee*, we next consider whether the more recent decisions of this Court limit the freedom of courts to utilize the analytical approach taken in those cases.

It seems beyond question that the courts below, in holding as they did, accepted the argument advanced by the school districts that *Hunter* and *Lee* represent a separate line of cases peculiarly applicable to legislative enactments dealing with racial matters. In our view, though, those decisions, though not overturned, have now been refined by several recent decisions of this Court. These later cases seem to us to make it quite clear that courts are no longer free to *presume* from the face of a given statute — as was done in *Hunter* and *Lee* — that an illicit segregative purpose motivated its passage. Such segregative purpose must now be separately proven by those challenging it. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights, et al. v. Metropolitan Housing Development Corporation, et al.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Cf. *City of Memphis v. Green*, 49 USLW 4389 (April 20, 1981).

Washington v. Davis, supra, involved a challenge to the validity of a written test given to District of Columbia police officer candidates. The plaintiffs there showed that the test had a profound discriminatory impact, effectively excluding a disproportionately high number of Black applicants. This Court held, however, that this was insuffi-

cient to make out a violation of the Fourteenth Amendment, saying:

> "* * * our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. (426 U.S. at 239).
> "* * *
> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action.' *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 37 L.Ed.2d 548, 93 S.Ct. 2686 (1973). 'The differentiating factor between de jure segregation and so-called de facto segregation * * * is *purpose* or *intent* to segregate.' (426 U.S. at 240).
> "* * *
> "* * * we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. (426 U.S. at 242).
> "* * *
> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of * * * statutes that may be more burdensome to the poor and to the average black than to the more affluent white." (426 U.S. at 248).

Washington v. Davis, was followed by *Village of Arlington Heights v. Metropolitan Housing Development Corp. supra*. The question involved in *Arlington Heights* was whether or not the refusal by a zoning board in a

Chicago suburb to allow construction of a low-income housing development amounted to discrimination on racial grounds. Citing *Davis*, this Court there reaffirmed that proof of discriminatory intent is required to make out a showing of invidious discrimination for Fourteenth Amendment purposes, saying, in part, at 429 U.S. 264-266:

> "Our decision last Term in *Washington v. Davis*, * * * made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' *Id.*, at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts. *E.g., Keyes v. School Dist. No. 1, Denver Colo.*, 413 U.S. 189, 208 (1973) (schools); * * *"
>
> "*Davis* does not require a plaintiff to prove that the challenged action rests solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, their judicial deference is no longer justified.
>
> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. * * *" 429 U.S. at 264-266. (Citations omitted)

Neither *Arlington Heights* nor *Washington v. Davis*, however, dealt with a statute. Thus, it remained arguable, even after these decisions, that *Hunter* and *Lee* stated the

controlling rule of law in challenges to purely legislative enactments which effectively created some sort of classification detrimentally affecting an identified homogeneous group. The validity of such an argument, however, was quickly dispelled by this Court's decision in *Personnel Administrator of Massachusetts v. Feeney.*

In *Feeney* a female state employee had passed a number of open competitive civil service examinations for better jobs but, because of a veterans preference statute, wound up ranked below male veterans who had achieved lower test scores. The statutory preference — available on its face to "any person, male or female, including a nurse" who was honorably discharged from the United States Armed Forces — clearly operated overwhelmingly to the advantage of males. The female employee challenged the statute, claiming that the preference formula violated the Fourteenth Amendment. A three-judge court initially declared the statute unconstitutional, stating that the preference statute's discriminatory impact upon women was so severe that it simply had to be struck down. *Anthony v. Commonwealth of Massachusetts,* 415 F.Supp. 485 (1976). On appeal, this Court vacated the judgment and remanded the case for further consideration in light of *Washington v. Davis. Massachusetts v. Feeney,* 434 U.S. 884 (1977). On remand, the District Court reaffirmed its original judgment on the basis that the consequences of the preference formula for the employment opportunities of women were simply too inevitable to have been "unintended." *Feeney v. Commonwealth of Massachusetts,* 451 F.Supp. 143 (1978). This Court again reversed, saying:

> The cases of Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signalled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. * * * Those principles apply with equal force to a case involving alleged gender discrimination. (442 U.S. 273, 274).
>
> "* * *

> "The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. * * * (442 U.S. 276).
>
> "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. * * * It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. * * *" (442 U.S. 279).

It should be emphasized here that the statute involved in *Feeney*, like Initiative 350, contained no *explicit* discriminatory classification in its text. In order to determine the presence of a discriminatory impact it was necessary there, as it is here, to resort to a factual analyis of the entire historical context in which the statute was adopted. *Feeney*, then, seems to make it clear that Initiative 350 is not subject to the sort of facial analysis employed by the three-judge court in *Lee v. Nyquist*, in particular.

In nevertheless resorting solely to that same analysis, the Ninth Circuit, in particular, has erred. As *Feeney* makes clear, a law such as Initiative 350 should be held unconstitutional only if it has been shown by those challenging it that the Washington electorate adopted it, at least in part, because of (rather than in spite of) a *collective deliberate* purpose to cause a racially discriminatory impact. In other words, it must first be shown that the Washington voters would not have selected or reaffirmed a modified neighborhood schools policy "but for" that policy's adverse effects upon identifiable minority groups.

II. THE DISTRICT COURTS FINDING THAT INITIATIVE 350 WAS ENACTED, IN PART, BECAUSE OF AN INTENT TO DISCRIMINATE ON RACIAL GROUNDS WAS WRONGLY PREMISED ON AN IPSO FACTO RATIONALE AND ITS CATEGORICAL DECLINATION EVEN

TO CONSIDER OFFERED EVIDENCE OF BENIGN SUBJECTIVE INTENT ON THE PART OF THE WASHINGTON ELECTORATE EFFECTIVELY THWARTED THE STATE DEFENDANT'S FACTUAL DEFENSE

As already noted, the Ninth Circuit based its affirmance of the District Court in this case solely on its own view that Initiative 350 created the same sort of racial classification which was found to be constitutionally objectionable in *Hunter* and *Lee*. It thus refused to inquire into the question of whether passage of Initiative 350 was the result of an intent or purpose to discriminate on racial grounds, the test most recently articulated by this Court.

On the other hand, the District Court did find that a purpose to discriminate on racial grounds was "a motivating factor" in the adoption of Initiative 350. Its approach to doing so, however, was simply not in keeping with that approach dictated by *Washington v. Davis* and its progeny.

In pertinent part, the District Court's memorandum opinion reads as follows:

> "As a second ground for holding Initiative 350 to be unconstitutional, I find that a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative.
> "* * *
> "It is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350. It was a measure adopted by the electorate at the ballot box. Unlike the normal legislative enactment there were no committee hearings or floor debates to cast light upon the intent of the enactors.
> "I believe that I can safely assume that a great many voters were motivated solely by a conviction that it was in the best interests of all children that they be permitted to attend their neighborhood schools; that there were many voters who were motivated solely by a desire to maintain as much racial separation as possible in the public schools; and that in between there were many voters who voted with varying degrees of mixed motives.
> "In deciding whether a racially discriminatory intent

> or purpose lay behind the adoption of Initiative 350, I cannot base my judgment upon what I believe I may 'safely assume' as to the subjective intent of the voters. As to that subjective intent the secret ballot raises an impenetrable barrier." (J.S. A-30,31).

In spite of this, the District Court then went on to find that a racially discriminatory purpose *was* a factor in the adoption of Initiative 350, relying almost solely on virtually uncontroverted evidence that most of the state's voters were aware that Initiative 350 was drafted in response to the Seattle Plan and that, if adopted, it would have the effect of curtailing its implementation.

The basic fallacy in this rationale is self-evident: mere opposition to mandatory bussing as a means to achieve racial balance is simply not the equivalent of the requisite intent to discriminate on racial grounds, both as a matter of law and as a matter of common sense. This latter proposition is borne out, in particular, by this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). *Dayton* makes it clear that, absent a showing that a constitutional duty to remedy de jure segregation exists in the first place, even purposeful rescission of official action already taken to remedy racial imbalance in public schools does not amount to proof of intent to discriminate on racial grounds.

In *Dayton* this Court held that rescission by a later-reconstituted Dayton, Ohio School Board of a prior resolution of its predecessor board which had acknowledged a constitutional duty on the part of the school district to undo prior official segregative acts did not constitute evidence of present discriminatory intent, saying at 433 U.S. 414-15:

> "* * * The District Court's conclusion that the Board's rescission of previously adopted School Board resolutions was itself a constitutional violation is also of questionable validity.
>
> "* * * We agree with the Court of Appeals treatment of this action, wherein that court said:
>
> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound

> up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf., *Hunter v. Erickson*, 393 U.S. 385 * * * (1969); *Gomillion v. Lightfoot*, 364 U.S. 339 * * * (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the constitution. * * *"

Thus, in *Dayton* this Court seems to have affirmed the basic principle that mere opposition to mandatory racial balancing measures (absent a *de jure* segregation situation), even when coupled with official action retreating from such measures, simply does not equate with official discriminatory purpose in violation of the Fourteenth Amendment. *Cf., Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974); *Gomperts v. Chase*, 329 F.Supp. 1192 (N.D.Cal. 1971).

The same principle is to be derived from *Austin Independent School Dist. v. United States*, 429 U.S. 990 (1976), a *per curiam* decision of this Court which vacated and remanded a decision of the Fifth Circuit in which that Court had held that the evidence before it showed intentional discrimination against Mexican-American school children in Austin, Texas. On remand, the Court of Appeals, in *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir., 1977), interpreted the *per curiam* decision of this Court as follows, at 564 F.2d 169:

> "There is language in our [earlier] * * * opinion that an official discriminatory intent adequate to support a finding of *de jure* segregation could be inferred solely from the school board's use of a neighborhood school policy for student assignment. To the extent [our earlier decision] * * * can be so read, it is inconsistent with *Washington v. Davis* and *Arlington Heights*. The Supreme Court recognized this ambiguity in vacating our decision and remanding the case to us.
>
> The District Court's equating of the Washington elec-

torate's adherence to the state's traditional neighborhood schools assignment policy — even in outright opposition to programs such as that operated by the Seattle School District — with a purpose to discriminate on racial grounds is illogical and simply wrong.

The electorate, in consciously adhering to the traditional policy, was obviously motivated by the same intent as was the Austin school board. The Fifth Circuit's interpretation of this Court's remand in *Austin* squares with the rest of the numerous federal decisions on point. Until the decisions below were reached, no federal court had ever held that a simple decision to adhere to (or return to) a pre-existing racially-neutral neighborhood schools assignment policy — even in the teeth of counterpressure to undertake racial balancing measures — amounted to official discrimination on racial grounds. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974); *Diaz v. San Jose Unified School District*, 612 F.2d 411 (9th Cir. 1979). These decisions, of course, square with the pronouncements of this Court. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

The District Court's concomitant flat refusal — on a categorical basis — to consider the Defendants' evidence of benign intent on the part of the voting public was extremely prejudicial. It is this very evidence which reinforces the principle of *Dayton* — that opposition to the concept of race-conscious mandatory bussing is *not* the equivalent of an attempt to discriminate on racial grounds.

The District Court simply declined to delve into the subjective intent of the Washington voters on the state basis that "* * * the secret ballot raises an impenetrable barrier." (J.S. A-31). However, that sort of categorical refusal does not square at all with the direction given by this Court in *Dayton Board of Education v. Brinkman, supra* where the knotty problem of determining intent was dealt with as follows, at 433 U.S. 414:

"We realize, of course, that the task of fact finding in

> a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, cf. *Arlington Heights v. Metropolitan Housing Development Corp.*, * * *"

The gravity of the District Court's incorrect approach becomes readily apparent upon review of the evidence which it deemed itself impenetrably barred from considering.

Received into evidence, but categorically excluded from consideration, were several public opinion polls evidencing a racially-benign subjective intent on the part of the Washington voters. One, a nationwide survey of racial attitudes, conducted by Louis Harris & Associates, demonstrated a genuine lack of segregative intent by members of the American white majority — an attitude particularly strong in the American West — coupled with equally sincere opposition to mandatory assignment of public school students to achieve racial balance. (Ex. A-133 at pp. 13-14, 42-43; Tr. 1346). The same poll showed that, on a nationwide basis, a plurality of black Americans oppose mandatory bussing as a desegregation remedy, a view which finds local reinforcement in one Washington opinion survey showing that Seattle area minorities expressed oppostion to suggested mandatory bussing in Seattle (Ex. A-127; Tr. 883, 886-888).

Published results of this latter poll, which appeared in the State's most widely-read newspaper (The Seattle Times), informed the electorate in early 1978, that roughly two-thirds of Seattle area *minority* parents opposed the imposition of a mandatory assignment plan for the purpose of alleviating racial imbalance in Seattle schools. On the other hand, the Seattle School District's own studies indicated that 71.2% of Seattle residents polled expressed an outright *preference* for living in a multi-racial neighborhood. (Ex. A-91; Tr. 1278).

In September of 1977, the Seattle School District Superintendent, in an open letter to parents of students in the District, described the District's voluntary magnet

school program as a "substantial success" which was "extremely encouraging." (Ex. A-59; Tr. 1019). Such a communication would logically incline any reader (*i.e.*, the average Seattle voter at the 1978 general election) to believe that a forced bussing program was therefore not required to alleviate any perceived racial imbalance. in Seattle schools.

There is other evidence in this record which also reflects that the Washington voters were not motivated by an intent to curb forced bussing solely for racial reasons. News articles carried in both major daily newspapers in the city of Spokane just prior to the 1978 general election contained reports of strong and vocal parental opposition to "bussing" in that Eastern Washington area which was entirely unrelated to race, *i.e.*, bussing to achieve desired levels of classroom balance. (Ex. A-130; Tr. 937). And on the west side of the State, less than a month before the election, the Bremerton Sun carried a report that the Central Kitsap School Board president favored passage of Initiative 350 in light of unnecessary bussing (again, for reasons unrelated to race) which had been undertaken in that District. (Ex. 117, p. 12; Tr. 574)

Advertising and public relations professionals called as witnesses by both appellants and appellees gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would actually *lose* support in the state of Washington if it was designed to appeal to segregative and racist attitudes. (Tr. pp. 496-498, 505-506, 509-511, 538, Ex. 2 Tr. 23).

The voting pattern on Initiative 350 is itself instructive. The initiative received a favorable vote in several school districts having minority populations in excess of the statewide average, where the school were already racially balanced due to residential patterns and neighborhood school assignment policies within those districts. (Ex. A-93; Ex. A-105; Tr. 774). A vote for Initiative 350 in those school districts was, then, a vote for maintenance of the racially balanced school system which already existed. To suggest that a vote in favor of the initiative in those districts was somehow motivated by an intent or purpose

to discriminate locally on racial grounds is utterly illogical.

It was the District's own witnesses, however, who presented the best evidence of benign subjective intent on the part of the electorate. They acknowledge repeatedly that a vast majority of parents — minority and majority — in all three school districts involved expressed, in one way or another, a preference for retention of the time-honored neighborhood school assignment policy. Seattle School Board member Bleakney testified, for example, that during the many public hearings dealing with the subject of racial imbalance in Seattle schools, the school board heard again and again that the parents wanted neighborhoods preserved. (Tr. 58, pp. 145-147). Dr. Tone of the Tacoma School District testified, as earlier noted, that as many as 95 percent of all parents — minority and majority — with whom he had been in contact expressed a preference for neighborhood schools (meaning, to them, the school "nearest" to their home). (J.A., pp. 20, 21). (Tr. pp. 391). And, again, Dr. Childers of the Pasco School District made it abundantly clear that attempts to lure East Pasco (*i.e.*, minority) residents to distant schools in the District were largely unsuccessful (thereby engendering school district regulations which now *require* minority kindergarteners to attend the most distant schools). (J.A., pp. 30, 31). (Tr. pp. 601-02). Dr. Childers also testified that if Initiative 350 is implemented in Pasco, East Pasco (*i.e.*, minority) residents would choose to have their children attend those two or three schools which are nearest and next-nearest (more or less) to the East Pasco area. (J.A., pp. 31, 53). (Tr. pp. 605, 634-38). In the Tacoma School District, notwithstanding an open, city-wide enrollment policy, at the time of trial only 1,200 students out of roughly 29,000 opted to attend non-neighborhood schools. (Ex. 99). (J.A., pp. 214).

The District Court simply ignored all of this admitted evidence — that bearing on the collective subjective intent of the electorate — and made no findings of fact whatsoever based on that evidence.

It must be remembered that, under *Washington v. Davis, supra*, and the cases which followed it, the districts

were burdened initially with proving that an intent to discriminate on racial grounds was a motivating factor in the adoption of Initiative 350. Following the refusal of the District Court to dismiss the District's complaint for failure to prove a *prima facie* case, the State defendants were, *at the very least*, entitled to have their best evidence — that showing that the collective motivation of the voting public was not as characterized by the Districts — weighed by the District Court and dealt with directly in its findings, conclusions and judgment.

III. INITIATIVE 350 REFLECTS A NATIONAL POLICY IN FAVOR OF NEIGHBORHOOD SCHOOL ASSIGNMENT MADE APPLICABLE BY CONGRESS TO DEPARTMENTS OF THE FEDERAL GOVERNMENT

In the preceding sections of this brief, we have emphasized two major points: (1) That Initiative 350 does not create a racial classification of the sort found constitutionally deficient in *Hunter* and *Lee* and; (2) that proof of discriminatory intent or purpose must be present before such state law may be struck down as violative of the Fourteenth Amendment. Generally in regard to either or both of these two points, there is an additional factor which certainly must also be taken into account. Throughout the entire course of this litigation the state defendants have repeatedly pointed out that Initiative 350 is nothing more than a state-level legislative parallel to an earlier 1974 act of Congress establishing a national neighborhood schools policy. Indeed, the evidence introduced at trial demonstrated conclusively that Initiative 350 was deliberately patterned quite closely after those same provisions of federal law — the Equal Education Opportunities Act of 1974 (now codified as 20 U.S.C. § 1701, *et seq.*). The relevant provisions of that Act (which are printed of J.S. F-5) read as follows:

> "1701. **Congressional declarations of policy**
> "(a) The Congress declares it to be the policy of the United States that —

> "(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
> "(2) the neighborhood is the appropriate basis for determining public school assignments."

Congress then reinforced this substantive expression of policy in the Act by expressly limiting the geographical extent of *any* federally-ordered bussing of public school children to precisely the same geographical extent as that expressed in Initiative 350, saying in § 1714: * * *

> "(a) No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student."

Although the foregoing statute has been subject to scrutiny on several occasions, it has remained intact as an expression of congressional policy in favor of a nationwide neighborhood school policy. See e.g., *Morales v. Shannon*, 516 F.2d 411 (1975), cert. den., sub. nom Shannon v. Morales, 423 U.S. 1034 (1975); *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir., 1975), cert. den., sub. nom Dayton Bd. of Education v. Brinkman, 423 U.S. 1000 (1975).

The striking conclusion drawn from juxtaposition of Initiative 350 with the provisions of 20 U.S.C. § 1701, *et seq.*, is that, if Initiative 350 did create a racial classification, it was no different than that created by Congress. And likewise, if passage of Initiative 350 was motivated by a purpose to discriminate on racial grounds, then that purpose is no different from that which motivated Congress as well. Such comparisons are, by no means, an idle intellectual exercise. If Congress is empowered to enact legislation of this type without violating the Due Process Clause of the Fifth Amendment to the United States Constitution, then it cannot be said that the State of Washington somehow violates the Equal Protection Clause of the Fourteenth Amendment by seeking to achieve the same ultimate goal using the same essential

legislative formula. *Bolling v. Sharp*, 347 U.S. 497 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

Indeed, in the recent case of *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir., 1980), the District of Columbia Circuit Court of Appeals reviewed the Congressional approach in the context of a challenge to certain Congressional appropriation bills preventing the Department of Health, Education and Welfare from withholding federal funds from school districts which subscribe to a neighborhood school assignment policy. In upholding the legislation, the Court of Appeals dealt with and rejected suggestions that the acts were unconstitutional based upon both of the points which we have emphasized in this brief — namely, (1) that the legislation created an illicit racial classification and, that (2) the underlying motivation for passage of the federal law was a purpose to discriminate on racial grounds.

The treatment of Initiative 350 by the courts below, then, is manifestly inconsistent with the treatment which has, to date, been accorded the provisions of the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1701, *et seq.*) by the federal courts. This inconsistency should not be continued. Washington's expression of a neighborhood schools policy should be upheld just as Congress's national policy has been.

IV. INITIATIVE 350 DOES NOT IMPOSE AN EXTRA AND UNCONSTITUTIONAL BURDEN ON SCHOOL DISTRICTS CONFRONTED WITH A DUTY TO CURE *DE JURE* SEGREGATION

A. The Initiative Does Not Prohibit Assignment Of Students To Remedy De Jure Segregation.

We again point out that, while the Ninth Circuit Court of Appeals limited its basis for decision (*i.e.*, to the existence of a racial classification in contravention of *Hunter* and *Lee*), the District Court also found Initiative 350 to be constitutionally deficient on yet another stated ground. The third and final basis for the District Court's

decision was stated as follows in its memorandum opinion:

> "I find that Initiative 350 is overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is *de jure* segregation, that is, segregation caused by prior governmental action." (J.S. A-35).

In so finding, the district court ignored entirely the interpretation of the initiative by the State, particularly (and most importantly) by the state officer charged in the first instance with its construction, the State Attorney General. That construction was stated clearly in the Trial Brief of State Defendants (CR 228) as follows:

> "Initiative 350, on its face, recognizes that constitutional imperatives may override its applicability in some situations.
>
> "Section Six of Initiative 350 provides:
>
> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.
>
> "The same sort of express disclaimer of infringement on the power of the courts has been held to validate the provisions of the Equal Educational Opportunities Act of 1974, 20 U.S. Code § 1701, *et seq.*, *supra*, by allowing the federal courts to deal with constitutional violations which have caused segregation within a given school system. *Evans v. Buchanan*, 416 F.Supp. 328 (1976); * * *
>
> "Thus, where a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. The Initiative clearly contemplates in Section Six that its action will be upheld by any court of competent jurisdiction, assuming that such constitutional duty is found to exist. Until a given school district reaches that point, however, it must, as a municipal corporate creature of the State of Washington, attempt to achieve its goals within the limitations imposed by its own creator. Since the initiative expressly subordinates its central policy to constitutional imperatives, how can it conceivably be claimed to be unconstitutional on its face?
> "* * *"

The appellants — charged by the Complaint with enforcement of Initiative 350 — have insisted from the outset

upon a construction of the statute which recognizes and provides for the constitutional necessity to undertake mandatory desegregation steps in certain instances without first having to seek an authorizing court order of some sort.[8]

The District Court should never have dealt with this issue, and, having dealt with it at all, it clearly erred in finding the act "overly inclusive." Initiative 350, by its very terms, operates directly upon Washington school districts. All Washington school districts receive legal advice and counsel from the prosecuting attorneys in those counties in which the districts are located. RCW 36.27.020(2) and (3). Those prosecuting attorneys, in turn, are statutorily guided by the formal opinions of the state Attorney General. RCW 36.27.020(3); RCW 43.10.030. The construction of the act by the Attorney General is binding on the State, absent a contrary judicial determination. Furthermore, any state official acting pursuant to the advice of the Attorney General is protected from liability and will not be found to have violated his or her official oath, even though such action is later held to be invalid. *State ex rel. Day v. Martin*, 64 Wn.2d 511, 392 P.2d 435 (1964). The Attorney General is an appellant in this case. In light of all this, it becomes apparent that the appellee school districts raised a false issue to the District Court. The school districts commenced this action claiming that it was the appellants who were going to enforce Initiative 350 in a manner which would prevent them (*i.e.*, the Districts) from performing *their* constitutional duties. In response, the appellants flatly asserted that this was not true and that they, in turn, would not and did not so interpret the statute. To complete the anomaly, the school districts thereupon insisted that, notwithstanding the less restrictive interpretation placed upon the initiative by appellants, the District Court was somehow dutybound to adopt *their* interpretation of Initiative 350 (one which enhanced the likelihood that the initiative could be characterized as unconstitutional). In falling into this trap the

[8]Such a construction is well supported by legislative history. Tr. 1171, 1180, 1181.

District Court ignored the all too familiar rule (pointed out to it in the State's trial brief) that legislation will be interpreted, if at all possible, in a manner which will render it constitutional and that "the dangers of an approach to statutory construction which confines itself to the bare words of a statute" are to be avoided. *Lynch v. Overholser*, 369 U.S. 705 (1962).

The Court's "task is not to destroy the Act," but to construe it, if consistent with the will of the state, "so as to comport with constitutional limitations." *U.S. Civil Service Commission v. National Letter Carriers Association*, 413 U.S. 548, 571 (1973). Where, as here, the defendants are the "very state authorities entrusted with the definitive interpretation of the language" of the act including the State Attorney General, this Court should not "ignore these authoritative pronouncements in determining the breadth of a statute." Rather, it should accept that interpretation, "however we might construe that language were it left for us to do so." *Law Students Research Council v. Wadmond*, 401 U.S. 154, 162 (1971); *Broderick v. Oklahoma*, 413 U.S. 601, 617-618 (1973).

B. A Requirement Of Prior Judicial Determination Would Not Render The Act Unconstitutional.

Even if the appellee's interpretation of Initiative 350 is correct, however, the requirement that a triggering court order be obtained in order to implement forced bussing in any Washington school district would not, of itself, render the act constitutionally invalid. Such a requirement is, in reality, fully consistent with the thrust of numerous decisions of this Court. A brief review of the history of school desegregation law emphasizes this point.

At the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the test for determining the existence of *de jure* segregation was really quite rudimentary. If a state, by law, provided for separate school facilities for children of differing races, then a finding of *de jure* segregation was quite simple to make. The later expansion of the defintion of *de jure* segregation,

however, has made it increasingly difficult to determine whether a given state (or local school district) has committed acts which amount to the creation of a dual school system. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). And, quite apart from determining whether or not segregation in any given school district was the result of purposeful official action, this Court has also grappled with the difficult proposition of determining when minority school children of one race are somehow isolated from the majority in sufficient numbers to trigger further inquiry into whether a remedy is required. *Spangler v. Pasadena Board of Education*, 427 U.S. 424 (1976).

In spite of the difficulty which this Court and the lower federal courts have had in coming to grips with such elusive concepts, it has been the consistent position of the appellee school districts in this litigation that, notwithstanding the fact that their essential purpose is to provide education, it is somehow *their exclusive province* to declare whether and to what extent *de jure* segregation exists within Washington's public schools, and, further, to declare the appropriate remedy therefore. In essence the districts argue that to limit the exercise of this "declaratory" power to the courts, would itself somehow violate the federal Constitution. Justice Powell in his opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) disposes of that notion, where, in discussing the inappropriateness of this same role which was assumed by the University of California in determining the need for a remedial program to alleviate perceived racial injustice, he says:[9]

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[9]Justice Powell's wisdom is amply supported here by a recent report prepared by the Seattle School District itself. In "The Effect of the Seattle Plan For School Desegregation on Achievement Test Scores," published in August 1981, the District says: "The purpose of the Seattle Plan was to reduce racial imbalance in the schools. Achievement of the goal has demonstrated the Plan's success. Any effect of the Plan on achievement test scores is irrelevant to evaluation of the Seattle Plan itself." The effect of Initiative 350, of course, even if the appellee's and District Court's interpretation is correct, is to tell school administrators to limit themselves to their "broad mission," education, where achievement test scores are indeed relevant, and to leave the formulation of

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. * * * (438 U.S. at 307).
>
> "* * * Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling jurisdiction for inflicting such harm.
>
> "Petitioner did not purport to have made *and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality.* * * * (Emphasis supplied.) (438 U.S. at 308, 309.)

To place the Washington school districts in the same position as this Court found the University of California to be in simply does not violate any provision of the U.S. Constitution.

The inappropriateness of the appellee's position on this so-called "overbreadth" issue is further highlighted by the variant definitions of "segregation," "racial imbalance," and "racial isolation" utilized by the three school districts which are parties to this appeal. As was noted above, the Seattle School District defines "racial imbalance" as:

> "* * * the situation that exists when the combined minority student enrollment in a school exceeds the district-wide combined minority average by twenty percentage points, provided that the single minority enrollment * * * of no school will exceed fifty percent of the student body." (J.A. 50).

It takes no great exercise of the mind to imagine the absurd results which would obtain if the Seattle School District's definition of "racial imbalance" was to be equated, as a matter of law, with "segregation." Indeed this *same* level of racial distribution has been determined

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social policy to the legislature, and the adjudication of constitutional duties to the courts, when necessary.

to constitute "racial isolation" by the State Board of Education (J.A. 66) in a definition which has been adopted, by reference, by the Tacoma School District (J.A. 66). On the other hand, the Pasco School District has simply declared that a "segregated" school in its district is any school in which minority enrollment exceeds fifty percent of the student body, although its principal school officials readily concede that minority children are not "isolated" from majority students by virtue of such a numerical distribution of students. (Childers' testimony, J.A. 39-42).

In light of all these considerations, then, a requirement that any extra-neighborhood bussing for the purpose of achieving a desired level of distribution in Washington public schools must follow some sort of triggering court order is by no means an unreasonable or unconstitutional legislative judgment. In view of the historical judicial development of school desegregation law, it is not unusual or unsound that a court — and only a court — should make the initial determination that a condition of segregation exists in a given school district which must be cured by means of bussing.

Thus, the suggestion that Initiative Measure No. 350 is somehow "overly inclusive" because, in the view of its challengers, it does not contemplate that Washington school districts will be allowed to make binding legal judgments as to when *de jure* segregation does or does not exist is simply not an unconstitutional infirmity.

V. THE NINTH CIRCUIT PANEL ERRED IN REVERSING THE DISTRICT COURT'S DENIAL OF ATTORNEYS' FEES TO THE SCHOOL DISTRICTS

Following entry of its Findings of Fact, Conclusions of Law and memorandum Opinion, the District Court then considered several petitions for awards of attorneys' fees by the districts and the intervenors. In denying these requests, the District Court's Order recited, in pertinent part, as follows:

> "4. * * * this action was commenced not by private persons whose own civil rights had been violated but rather by three public bodies, the school districts of Seattle, Tacoma and Pasco. The financial concerns of these public bodies are hardly analogous to those of impecunious parents of school children whose civil rights may have been violated. Although the school districts do not have unlimited funds, they do, at least, have available to them public funds with which to prosecute litigation. The plaintiffs are to a very large extent financed by appropriations from the state. In part those appropriations are to defray administrative costs, including the legal expenses, of the plaintiff school districts. (J.S. C-2).

On appeal, the Court of Appeals concluded that the trial court had abused its discretion in refusing to award attorneys' fees to the school districts. In fact, the panel majority actually substituted its discretion for that of the District Court and concluded that it was unreasonable *not* to award fees to a school district created, controlled, and funded by the defendant. (J.S. B 15, 16).

A. The Court Of Appeals Judgment On Attorneys' Fees Itself Constitutes An Abuse Of Discretion.

The trial court recognized that this litigation had already been, and continues to be, largely funded by money appropriated for the school districts by the defendant state for purposes which include the conduct of this litigation. The Court of Appeals, however, concluded that refusing to require the state to reimburse school districts for their expenditure of *State* funds, enabling them to sue the *state*, was an abuse of discretion!

The Court thus adopted a rule which *requires* that the source of litigation funding be entirely ignored, and which encourages, as a matter of national policy, "double dipping" from public treasuries. In so holding the panel majority cavalierly gave the back of its hand to the District Court's findings and exercised its "discretion" in favor of a result which Congress almost certainly did not intend, and which, as the District Court found in this circumstance,

was not necessary in order to encourage enforcement of the Civil Rights laws.

B. The Court Of Appeals In Effect Injected Itself Into The State's Legislative Appropriation Process.

By awarding fees to the Seattle School District, the panel majority has, in effect, appropriated funds from the State's treasury in favor of a municipal corporation of the State, created, funded and controlled by the State, and deriving its existence and authority entirely from state law. It has, inescapably, made a decision with respect to the appropriate funding of state programs and the establishment of state legislative priorities. Such action by the Court (or by Congress, if indeed that is what it intended) constitutes an unwarranted interference in the State's "ability to function effectively in a federal system." *National League of Cities v. Usery*, 426 U.S. 833 (1976). While admittedly, *Usery*, is not dispositive in the case of a statute enacted pursuant to § 5 of the Fourteenth Amendment, rather than the Commerce Clause, its reasoning nevertheless is compelling under these circumstances and should guide the court here.

The trial court's refusal to award attorneys' fees was *not* an abuse of discretion. This Court should not depart from established standards of deference to the states in this area of internal fiscal policy, absent a showing of absolute necessity. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973).

C. It Is Doubtful That Appellee School Districts Even Fall Within The Ambit Of The Attorneys' Fees Statutes.

The Court of Appeals cited no authority for the proposition that municipal corporations — as creatures of statute — are even with the ambit of 42 U.S.C. § 1988 or 20 U.S.C. § 3205 so that they may, in this manner, demand additional public funds to replace those already furnished to them by the state legislature. Congress did not intend or even envision such a result.

In connection with the passage of 42 U.S.C. §1988, for

example, the Senate Report which accompanied the bill stated, in part, as follows:

> "All of the civil rights laws depend heavily upon *private* enforcement, and fee awards have proved an essential remedy if *private citizens* are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain. In many cases arising under our civil rights laws, *the citizen* who must sue to enforce the law has little or no money with which to hire a lawyer. If *private citizens* are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then *citizen* must have the opportunity to recover what it costs them to vindicate these rights in court." [1976 U.S. Code Cong. & Admin. News at page 5908.] [Emphasis supplied.]

The legislative policy in favor of subsidizing *private* litigants has uniformly been reaffirmed by the courts. The case most often cited in support of this general expression of Congressional policy is *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), decided before either of the statutes here involved was enacted.

The essence of this Court's reasoning was stated at 390 U.S. 402:

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees — not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, *to encourage individuals injured by racial discrimination* to seek judicial relief under Title II." (Emphasis supplied.)

The so-called "private attorney general" rationale for awards of attorneys' fees makes no sense in the present context. The original plaintiffs here were school districts — political subdivisions of the state, the operations of which are entirely publicly funded — not private citizens acting as "private attorneys general." That term itself connotes belief on the part of the courts that, when matters

are finally settled and it is the private plaintiffs who have prevailed, it is appropriate that the public treasury should be tapped to pay for litigation found to have been commenced in the public interest. But that is precisely what has happened here already. The language in the foregoing excerpts expressing concern about the "cost of private enforcement" has no application whatsoever in the situation where, as here, state-funded municipal corporations themselves seek the relief.

To summarize then, it seems amply clear that the Congressional purpose in enacting the various civil rights attorneys' fees statutes would not at all be served by allowing the school districts to replenish public funds already given them by the state for this very purpose.

If the Court of Appeals' view prevails, it may be counterproductive. States are today facing what can honestly be described as a fiscal crisis. The courts cannot fail to recognize this reality. Intense competition exists among worthwhile and important public programs for the use of increasingly scarce public dollars. The result of awards such as that of the Court below in this case may indeed be the withdrawal by the states of "legal services" funds from their subordinate public bodies and *other* publicly funded agencies; such as legal services organizations. To avoid the fiscal drain of "double dipping," state legislatures may choose to require those theretofore state-funded agencies to support their legal services efforts entirely -- or at least in significant part — from other sources. The fundamental purpose of the civil rights attorneys' fee statutes will thus not be fostered, but rather inhibited.

CONCLUSION

Initiative 350 is valid. It creates no impermissible special classification, was not motivated by a purpose to establish or foster a system of segregated schools and is not "overly inclusive." Alternatively, the school districts are entitled to no award of attorneys' fees.

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No. 81-9

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In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, et al., (Seattle Intervenor Plaintiffs/Appellees)

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QUESTIONS PRESENTED

1. Does a statute that does not specifically use the words "race" or "racial", but which has a concededly racial nexus, having been conceived, drafted, advocated, and adopted for the specific purpose of terminating an ongoing program to eliminate racial imbalance in a previously segregated school district, constitute a suspect racial classification?

2. Does a statute which inhibits local school officials from using a method necessary for the effective elimination of racial segregation from the public schools impermissibly interfere with the constitutional duties of such school officials?

3. Does a statute granting a private right to attend the public school nearest or next nearest a student's residence impermissibly involve the state in the encouragement and promotion of private discrimination where the conceded effect of

the decisions of private individuals sanctioned by the statute is a resegregation of previously desegregated public schools and increased residential segregation by race?

4. Did the district court correctly analyze the relevant facts in reaching its conclusion that a racially discriminatory intent or purpose was one of the factors which motivated the adoption of Initiative 350?

5. Did the court of appeals correctly apply the usual rule that successful plaintiffs should be awarded their reasonable attorney's fees and costs in actions to vindicate constitutional rights, absent a special circumstance rendering such an award unjust, where the denial of constitutional rights was by the state, and the litigation costs would otherwise be paid from funds allocated for the education of the children whose rights were vindicated?

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NO. 81-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF SEATTLE INTERVENOR PLAINTIFFS/APPELLEES

STATEMENT OF THE CASE

A. Adoption of School District Appellees' Statement of the Case

The brief filed by the School District Appellees accurately summarizes the historical background and the record, and is adopted by these appellees. In this respect, and in the argument herein, these appellees wish to avoid duplication of that which is well presented elsewhere.

B. Comments on Appellants' Statement

The Statement of the Case, set out in the Brief of Appellants at 3, requires comment. The section entitled "The Historical Legal Background" goes outside of the record to claim a state history of non-discrimination that does not comport with reality and was not at issue in the courts below. These appellees will address this error in their argument.

The Brief of Appellants also erroneously describes Tacoma as a desegregated district with "no mandatory bussing program" which "adheres to an 'open enrollment' policy which allows any student within the District to attend the school of his or her choice, subject to practical limitations, using the Tacoma Transit System." Appellants' Brief at 6.

In fact, the Tacoma desegregation program operates by denying minority

students admittance to their neighborhood schools in order to create capacity for white students to transfer into those schools. While these minority students may still be free to choose which alternate school to take a bus to, it is misleading to say that there is no "mandatory bussing program." (J.S. A-24-25). While this distinction may appear slight, it is significant. If the State were correct in asserting that Tacoma is able to maintain a desegregated system through a truly "open enrollment" policy, Initiative 350 would have no impact on racial imbalance in that system. However, as the district court specifically found, "[i]f implemented, Initiative 350 will make it impossible for Tacoma schools to maintain their present racial balance." (J.S. A-25, ¶ 10.1).

SUMMARY OF ARGUMENT

After years of increasing racial segregation in Seattle's schools, the Seattle School Board, threatened with imminent litigation, adopted the Seattle Plan for the Elimination of Racial Imbalance. Implementation of the Seattle Plan in the school year beginning September 29, 1978, was well underway when Initiative 350 was adopted with an effective date of December 7, 1978.

The district court found that Initiative 350 "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." (J.S. A-34). That conclusion is not questioned by the appellants. Nor do they seriously question the district court's conclusion that Initiative 350 would accomplish its purpose if it were adhered

to by school officials (in the absence of an overriding court order).

1. In concluding that a racially discriminatory purpose was one of the factors that motivated the conception and adoption of Initiative 350, the district court correctly considered the factors outlined by this Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Factors considered by the district court included the historical background of Initiative 350, the specific sequence of events leading to it, the procedural and substantive departures from the norm in connection with its adoption, and what the State admits to have been the "virtually uncontroverted evidence that most of the state's voters were aware that Initiative 350 was drafted in response to the Seattle Plan and

that, if adopted, it would have the effect of curtailing its implementation." (Appellants' Brief at 29).

2. The district court also correctly concluded that Initiative 350 is a racial classification unsupported by any compelling state interest. The rationale articulated by the Court in Hunter v. Erickson, 393 U.S. 385 (1969), applies with even greater force to this case, since Initiative 350 seeks to undo benefits already gained and creates a greater political barrier to the achievement of important goals by racial minorities than that created by the amendment of the Akron City Charter in Hunter.

3. The district court was also correct in concluding that Initiative 350 is overly inclusive because it prohibits local school officials from taking actions pursuant to the Court's often

repeated command that local school officials have the first and primary responsibility for eliminating racial discrimination in the public schools. Even if the State Attorney General were to render an authoritative opinion stating that Initiative 350 has no effect on the power of local school officials who believe themselves to be under a constitutional obligation, the defect would not be cured. Such an opinion would, at most, prevent enforcement action by state officials but could not prevent any interested person from enforcing the statute, since state courts are not bound by opinions of the Attorney General.

4. Initiative 350 is also invalid under the principle announced in Reitman v. Mulkey, 387 U.S. 369 (1967), that a state may not significantly encourage private discrimination. Although not relied upon by the lower courts, this principle provides an additional basis for affirmance.

5. The claim by the State that Initiative 350 merely restores a "state-wide neighborhood policy" is totally without merit. No such policy exists, and the state-wide policy to eliminate racial isolation that predated Initiative 350 would be destroyed by it.

6. These appellees ask that the Court disregard the position now taken by the United States and disallow further participation by the United States as a party. The brief on behalf of the United States was filed after these appellees objected to the ethical propriety of continued participation in the case by attorneys who previously participated on the opposite side. The original permission to intervene granted to the United States was based upon a statute permitting such participation only in support of civil rights plaintiffs. The United States' unprecedented repudiation in this Court of

the position it urged in the lower courts should not be condoned.

7. These appellees fully support the School District Appellees with respect to the issue of attorneys' fees. The award of attorneys' fees to the School District Appellees directed by the court of appeals is consistent with the purpose of the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. Failure to allow attorneys' fees would directly penalize the children who attend the Seattle public schools since the cost of this litigation would be paid out of money intended and otherwise available for direct educational expenditures. The State's claim that an award of attorneys' fees would represent a "double-dipping" by the Seattle School District is factually incorrect.

The courageous action of the Seattle School Board is precisely what the Court has demanded of school officials in the

past. Now the Court should lend the full weight of its legal and moral authority to the support of that school board. The Seattle Plan is a dramatic step toward the fulfillment of the national dream of equality of opportunity. It is unthinkable that this Court would require the Seattle School District to turn back now toward a resegregation of its public schools and the entrenchment of segregated housing that the district court found would follow.

ARGUMENT

The State Attorney General's Account of State History On Racial Matters Is Misleading

In its statement of the case under a section entitled "The Historical Legal Background," the Attorney General makes an assertion of fact which, even if technically correct, is highly disingenuous:

> To date, no Washington school district has ever been judicially declared to have engaged in racial segregation in violation of the Fourteenth Amendment in the assignment of students in Washington's

> public schools. [State's Brief at 3.]

In going outside of the record to allege the non-existence of prior judicial determinations of purposeful segregation in Washington State, the Attorney General would apparently have the Court draw the inference that purposeful segregation has never occurred in Washington. The absence of such a judicial declaration is hardly surprising in view of the fact that the only three school districts with sufficient minority populations to be impacted by Initiative 350 were desegregated by their own school boards after the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954).[1] Rather than drawing the inference of non-discrimination sought by the Attorney General, the

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[1] Pasco and Tacoma accomplished the desegregation of their schools before the Court's decision in Keyes v. School Distr. No. 1,

facts compel the opposite inference. First, the inference sought by the Attorney General is destroyed by the State's own admissions. As the State informed the district court in the Post Trial Brief of State Defendants (CR 387 at 23):[2]

> [T]he state defendants believe that the Pasco School District is presently under an obligation to cure both the original (but still partially unproven on this record) and the ongoing invidious and intentional racial discrimination (which has already been described above and which is established on this record.) [State's emphasis].

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413 U.S. 189 (1973). (J.S. App. A-9 to A-12). Seattle's desegregation of its middle schools and later adoption of the Seattle Plan both followed and responded to litigation or threats of litigation. (J.S. App. A-14 to A-18). See also pp. 72-79, infra, discussing the Seattle School District's allegations of purposeful discrimination by other governmental entities and its admissions of the probability that a court would find unlawful segregation in Seattle if the facts were examined in litigation.

[2]In its brief to this Court, the State also asserts that the Pasco School District is

In its review of "The Historical Legal Background," the Attorney General also makes reference to "a comprehensive scheme of civil rights law," with citations to 14 state statutes relating to discrimination. (State's Brief at 3-4 n.2). The only possible relevance of these statutes to the matter before the Court would be if the Attorney General were asking the Court to infer from these statutes that racial fear and prejudice has never existed in Washington and that, therefore, it is unlikely that racial fear and prejudice could have motivated any of those who proposed or supported Initiative 350. Again, the opposite inference is compelled. If Washington State were free from this pernicious national affliction, there

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Footnote 2 (cont.)

guilty of "invidious racial discrimination" in a situation "worse than that which the Sixth Circuit found deplorable in Lansing." (State's Brief at 15-16).

would have been no need for such legislation. In fact, the continuing existence of racial prejudice and intolerance is evidenced by the most recent anti-discrimination statute, passed in 1981 by the Washington State Legislature in response to cross burnings at the homes of blacks in Seattle, Kent and Woodinville, the painting of swastikas on Jewish-owned businesses in Olympia, and harassment of Hispanics in Yakima.[3] The State fails to mention

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[3]Senate Bill No. 3342, Chapter 267, Laws of 1981, a criminal statute relating to malicious harassment, effective July 26, 1981. The cross burnings and other racial incidents were widely reported. See Seattle Times, Nov. 4, 1980, § C at 2; Seattle Post-Intelligencer, Nov. 4, 1980, § A at 7; Seattle Times, Nov. 26, 1980, § D at 18; Seattle Times, Jan. 18, 1981, § E at 21, Seattle Times, Apr. 2, 1981, § A at 16; Seattle Times, Aug. 17, 1981, § C at 2; Seattle Post-Intelligencer, Oct. 31, 1981, § C at 1; and Seattle Times, Oct. 31, 1981, § B at 10.

this statute and this history in its brief.[4]

In sum, Washington, as elsewhere in the nation has a record of discrimination against racial minorities that includes both progressive efforts to cure the scourge and continuing reminders of the extent to which human action is influenced by subconscious fears and prejudices.

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[4]Prejudice and Discrimination in Washington has not been limited individual action. Some examples of proven discrimination by governmental entities: Lindsay v. City of Seattle, 86 Wash. 2d 698, 704, 548 P.2d 320, 325, cert. denied, 429 U.S. 886 (1976), (evidence established prima facie case of discrimination against minorities in city employment practices); Hsieh v. Civil Serv. Comm'n of Seattle, 79 Wash. 2d 529, 488 P.2d 515 (1971) (public employment discrimination against aliens); Washington Bd. Against Discrimination v. Board of Directors, 68 Wash. 2d 262, 412 P.2d 769 (1966) (school district discriminated on basis of race in employment); Castaneda v. Granger Pub. Schools, Washington Human Rights Reporter PWD-122, (Washington State Human Rights Commission, March 15, 1973) (district held to have discriminated in employment on the basis of race).

Providing Truly Equal Opportunity In Public Education Requires Steadfast Adherence to the Principles Announced In Brown I and II and Their Progeny

By comparison with the 204 years which transpired from Virginia's legislative recognition of slavery as an institution in 1661 to 1865 when the Thirteenth Amendment officially terminated slavery in the United States, the 28 years since this Court's decision in Brown I[5] is a mere historical moment.

The Court is well aware of the resistance that has frequently accompanied the implementation of the Court's mandate in Brown I. In light of that resistance, it is remarkable that the basic teaching of Brown I has never seriously been questioned:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both

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[5] Brown v. Board of Education, 347 U.S. 483 (1954).

> demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

347 U.S. at 493, 495.

Brown II[6] considered "the complexities arising from the transition to a system of public education freed of racial discrimination." 349 U.S. at 299. The Court went on to declare that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Id.

The affirmative duty of school boards to eliminate racial discrimination was again emphasized in Green v. County School

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[6] Brown v. Board of Education, 349 U.S. 294 (1955).

Board of New Kent, 391 U.S. 430 (1968), and its companion cases.[7]

The primary, affirmative obligation of local school officials was reiterated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in a unanimous opinion by the Chief Justice: "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked." Id. 15.

In considering when and under what circumstances the courts should interfere with the administration of the public schools, the Court has noted:

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[7] Raney v. Board of Ed., 391 U.S. 443 (1968); Monroe v. Board of Comm'rs., 391 U.S. 450 (1968). In Green, the Court also held that local school authorities do not meet their "continuing duty" to eliminate racial discrimination by the adoption of a "freedom of choice" plan where experience has shown such a plan to be ineffective. 391 U.S. at 440.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. at 469. Thus, in San Antonio School District v. Rodriguez, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

Milliken v. Bradley, 418 U.S. 717, 741-742 (1974).

Of all of the constitutional doctrines relating to race and schools that this Court has articulated, none has been more often repeated and more steadfastly adhered to than the principle that local school officials have a primary constitutional duty to take such actions as may be required to assure the vindication of the

constitutional rights of the children whose school attendance is compelled by the State.[8]

Initiative 350 seeks to deny from Washington's local school officials the very responsibility this Court has repeatedly held to be imposed upon them by the Constitution. It is difficult to conceive of a statute which more directly and flagrantly confronts the principles enunciated by this Court. As noted earlier, both the statute struck down in Lee v. Nyquist, 318 F. Supp. 710, and the Equal Education Opportunities Act of 1974, upon which the State mistakenly relies, specifically granted local school officials the power

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[8] In addition to the cases cited above, other cases recognizing this affirmative duty include Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 460 (1979); Dayton Bd. of Ed. v. Brinkman (II), 443 U.S. 526, 537 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); United States v. Scotland Neck Bd. of Ed., 407 U.S. 484 (1972); Davis v. School Comm'rs of Mobile County, 402 U.S. 33 (1971).

Initiative 350 seeks to deny them. Even California's Proposition 1, under review with this case in No. 81-38, Crawford v. Board of Education, specifically provides that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended." (Petitioners' Brief in No. 81-38 at 6).

Seattle was the first major city in the United States to implement an extensive desegregation plan without court order.[9] The Seattle Plan works. On October 16, 1981, the President of the Seattle School Board testified before the Subcommittee on Separation of Powers of the Committee on

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[9] U.S. Comm'n on Civ. Rts., Desegregation of the Nation's Public Schools, A Status Report 67 (1979).

the Judiciary of the United States Senate:[10]

> The Seattle Plan has successfully desegregated Seattle's schools, and educational quality has been enhanced. All students now have the opportunity for a multi-ethnic education, which Seattle citizens believe is essential to preparation for life in this pluralistic society. There have been no adverse educational effects. Achievement scores have risen slightly district-wide, and in fact, achievement gains in the pairs and triads appear greater than in other District schools.
>
> The Seattle Plan has not had a harmful effect on white enrollment. Before the Plan, enrollment had fallen steadily from nearly 100,000 (over 85% white) in 1963 to under 60,000 (65% white) in 1977. In the first three years of the Seattle Plan, the proportion of white students in the District declined roughly 3% per year, the same rate as in the three years before the Plan. Had it not been for the influx of thousands of Asian immigrant students, the drop in the

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[10] See Oct. 16, 1981 Statement of Suzanne Hittman, Proposed Bills on Court Ordered School Busing - Hearings on S.528, S.1147, S.1647, & S.1743 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. (1981).

proportion of white students this year and last would have been closer to 1%. And it appears that school desegregation has played a part in slowing, and even reversing, the trend toward greater residential segregation in some portions of the city.

Seattle has adjusted peacefully to desegregated schools. At the last local property tax levy election, a near record rate of voter approval -- roughly 80% -- was achieved. And in the most recent School Board elections, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates. Several efforts to stop the Plan, including a statewide initiative and recent legislative action, have been resisted successfully by the School Board in the courts.

Last spring, after a lengthy process of citizen involvement, the Seattle School Board adopted a three-year plan of school closures and complementary changes in the desegregation plan. Continued local control of desegregation has permitted modifications in the Plan to be made on an educationally sound basis, and with minimum disruption.

Seattle is now prepared to make further progress. The City Council and School Board have jointly adopted goals calling for coordinated action to encourage residential integration. With cooperation of City, School District and housing officials, Seattle should be able to reduce the need for mandatory assignments over the long term.

> We believe the Seattle experience demonstrates how proper planning and responsible leadership can produce school desegregation that is successful educationally and successful in stabilizing a city school system. Where elected officials do not ignore their oaths of office, but instead discharge their constitutional obligations, the courts and the federal government need not intrude in local school governance. Again, we urge the Committee to refrain from any action which would impair the ability of local school districts to desegregate with local control, or which would impair their incentive to do so.

Appellants' Arguments Disregard the Central, Unique, Critical, and Controlling Fact of This Case: The Initiative Was Designed to, and if Enforced Would Resegregate Previously Desegregated Public Schools

A. The factual context

Appellants' brief avoids any mention of the undisputed fact that enforcement of Initiative 350 would actually cause the resegregation of thousands of school children in the only three school districts that the initiative substantially affects. This is the unique and controlling fact of this case. This ultimate fact should be

considered together with six other basic facts, none of which are in substantial dispute:

1. If the Seattle School Board had not adopted the Seattle Plan, the Board would have become a defendant in an action alleging past purposeful segregation of the district. (J.S. A-18, ¶ 6.12; Complaint in Intervention of Seattle Intervenor Plaintiffs at 5-7).

2. The Seattle School Board had full legal authority to adopt and implement the Seattle Plan under Washington law prior to Initiative 350. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

3. The action of the Seattle School Board in adopting the Seattle Plan was mandated by and consistent with existing state policy requiring the elimination of segregation in the public schools, whether de jure or de facto. See argument infra at pp. 44-51.

4. The Seattle Plan was already in its first year of implementation (a school year beginning on September 29, 1978) and had sharply reduced the degree of racial imbalance in the Seattle School District when Initiative 350 was passed. Affidavit of David L. Moberly [supporting Plaintiffs' Motion for Preliminary Injunction at 13 and Ex. D thereto]; (J.S. A-18, ¶ 6.13 and A-22, ¶ 7.24).

5. Initiative 350 was "conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." (J.S. A-34.)

6. The district court's finding that implementation of Initiative 350 would result in increased racial imbalance in the plaintiff school districts is undisputed. (J.S. A-23, ¶ 8.1.)

B. The rationales of Hunter v. Erickson and Lee v. Nyquist apply with even greater force to the facts of this case

The State's efforts to distinguish Hunter v. Erickson, 393 U.S. 385 (1969), and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), only reinforce the conclusion that the rationale of those decisions applies with even greater force to the facts of this case than to the facts upon which those cases were decided.

The amendment to the Akron City Charter struck down in Hunter, and the statute struck down in Lee, both applied only to future efforts by racial minorities to achieve equality of opportunity in housing and education. In marked contrast, Initiative 350 was intended to, and would, if enforced, not only limit the authority of local school districts to accomplish

desegregation in the future, but would actually reverse progress made in the past.

In Hunter, a fair housing ordinance enacted by the Akron City Council was invalidated by a referendum amending the City Charter. The City Council had been under no affirmative constitutional obligation to enact such an ordinance. Indeed, the Akron Ordinance had provided "an enforcement mechanism unmatched by either state or federal legislation." 393 U.S. at 389. In striking down the charter amendment, the Court said in Hunter:

> Even though Akron might have proceeded by majority vote at town meeting[s] on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 392-393.

According to the State, "[t]he true basis for Hunter, it is also important to note, was emphasized in James v. Valtierra, 402 U.S. 137 (1971)... ." Appellants' Brief at 12. The State then quotes the very language from James v. Valtierra that distinguishes it from this case as effectively as it distinguished it from Hunter:

> The Article [amending the California Constitution] requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority

Appellants' Brief at 12-13, quoting from 402 U.S. 140-141 (emphasis added).

James v. Valtierra, like San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), involved non race-related legislation. Although Initiative 350 did not employ the word "race" or

"racial", just as in Hunter, the legislation was uncontestably race-related.[11] The portion of James v. Valtierra quoted by the State makes it clear that the touchstone of Hunter is not the mere use of the word "race" or "racial" in a statute, but whether "in fact" the legislation was intended to deal with a racial matter.

The New York statute struck down in Lee v. Nyquist, 318 F. Supp. 710, was far less comprehensive in its prohibitions of actions designed to improve racial balance. That legislation sought to prohibit state education officials and appointed school boards from action to alleviate racial imbalance, "[e]xcept with the express approval of a board of education having jurisdiction, a majority of the members of

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[11] The second question presented by the State even acknowledges Initiative 350's "racial nexus." Appellants' Brief 1.

such board having been elected. . . ." Id. at 712. The statutory obstacles to effective desegregation created by Initiative 350 deny the very exception allowed by the statute in Lee.

In Lee, as in the present case, the state defendants argued that the legislation did not constitute impermissible state involvement in racial discrimination in the absence of a finding of de jure segregation. The three-judge panel in Lee replied:

> But the argument that the state has not discriminated because it has no constitutional obligation to end de facto racial imbalance fails to meet the issue under Hunter v. Erickson. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. Indeed it completely prohibits the implementation of such policies where the local board is not elected. The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification.

Id. at 719 (court's emphasis).

Initiative 350 not only places a greater burden on those seeking to implement educational policies designed to deal with race on the local level than the statute struck down in Lee, but it operates retroactively to deprive minorities of benefits already gained. The court in Lee, quoting interrogatory answers by the defendant Commissioner of Education, noted that "[the New York statute] will not itself tend to reduce benefits already gained... ." Id. at 717.

Straining to find a meaningful distinction between the two statutes, the State points out that Initiative 350 allows elected school boards to assign students to the "next or next nearest" school while the statute in Lee forbade non-elected school boards from compelling assignments "even to the next nearest school." Appellants' Brief at 14. This comparison is specious. Although Initiative 350 prohibits locally

elected school boards from assigning students to any but the "nearest or next nearest" school, the statute in Lee permits locally elected school boards to assign students to any school for any reason, including achieving racial balance. The tortured effort to distinguish Lee continues when the State asserts:

> And observe further, in this regard, that the ban [in Lee] applied only in districts where the majority of the school board was not elected, i.e., in those districts in which the "local racial hostility" to increased racial balance could not exercise control on the local level.

Appellants' Brief at 14 (Appellants' emphasis). Although the meaning of the quoted statement is somewhat obscure, the State apparently suggests that the statute in Lee somehow would have been less offensive if the ban had also applied to those districts in which "local racial hostility" to increased racial balance

could exercise control on the local level, i.e., those districts where the majority of the school board was elected.

C. Initiative 350 significantly involves the State in the encouragement of private discrimination

Although the lower courts did not reach or rely upon the separate constitutional doctrine that a state may not significantly involve itself in the facilitation or encouragement of private discrimination, that doctrine provides a separate and independent ground for affirmance. For much the same reasons outlined above with respect to Hunter v. Erickson, and Lee v. Nyquist, the rationale of Reitman v. Mulkey, 387 U.S. 369 (1967), applies with even greater force to the facts of the present case than to the amendment to California's state constitution invalidated in that case. That amendment, like the legislation in Hunter and Lee, had only

prospective application. That amendment invalidated existing state fair housing legislation, but did not seek to strip any person of benefits already obtained under that legislation. Initiative 350, by contrast, is a statute designed to restore the status quo ante.

Further, unlike private housing transactions, assignment of students to public schools has always been exclusively a public function. Initiative 350 turns that function over to private persons, who are then authorized to exercise racial prejudice in their choice of public schools by choosing to reside in racially segregated neighborhoods with assurance that the racial segregation will extend as well to the schools. Even some of the sponsors of Initiative 350 candidly admitted in their testimony in the district court that some parents, given the choice, would act on racial fear and prejudice to utilize

Initiative 350 to assure that their child would be isolated from children of other races. (See, e.g., J.A. 102-104).

These private decisions, whether or not racially-motivated, affect both the child for whom the decision is made and the entire school system. If local school boards are prohibited from assigning students to any school except that nearest or next nearest their home, even, an "open enrollment" policy is doomed to failure as history in Seattle and elsewhere has amply shown. The district court's finding that racial imbalance in the plaintiff's school districts would increase under Initiative 350 was not in dispute in the trial court and is not disputed on appeal. (J.S. A-23, ¶ 8.1). There is also no dispute over the finding that under Initiative 350 "there is certain to be movement of white parents away from those residential areas where there is a preponderance of minority

families." (J.S. A-25). Through permitting and encouraging such private decisions Initiative 350 would cause the resegregation of the public schools, and greater residential segregation, thereby achieving indirectly what the State cannot do directly. San Francisco Unified School District v. Johnson, 92 Cal. Rptr. 309, 479 P.2d 669, 678-79, cert. denied, 401 U.S. 1012 (1971); see Anderson v. Martin, 375 U.S. 399, 404 (1964); See Evans v. Newton, 382 U.S. 296, 306 (1966) (separate opinion of White, J.). As this Court noted in Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961), "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

The analysis urged upon this Court by the United States in its amicus curiae brief, at 12-15 in Green v. County School

Board, 391 U.S. 430 (1968), is particularly apt in considering this matter:

> [E]ven if accidental segregation in public education is permissible, the Constitution does not tolerate schemes which invite that result to be accomplished by indirect means through a delegation of State responsibility. [citations omitted.]
>
> In sum, where freedom-of-choice plans leave the schools essentially segregated, while a more traditional assignment policy would not, that segregation may fairly be attributed to the State. That conclusion alone covers the present cases. But the fact that the State is knowingly contributing to the result has another dimension also.
>
> . . . .
>
> The principle is not limited to situations in which the State teaches a philosophy of racial inferiority by expressly compelling segregation. The same message can be conveyed by lesser measures and they are equally forbidden. E.g., Lombard v. Louisiana, 373 U.S. 267; Robinson v. Florida, 378 U.S. 153. Indeed, in some contexts, the Equal Protection Clause prohibits official action which merely facilitates, or gives effect to, private discrimination on the ground of race. E.g., Anderson v. Martin, 375 U.S. 399; McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151; Shelley v. Kraemer, 334 U.S. 1. And see Reitman v. Mulkey, 387 U.S. 369. The State cannot gratuitously take

> steps to make discrimination easy; the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice. So, here, we submit, the State authorities overstepped the constitutional line by adopting student assignment plans which predictably, if not designedly, cater to the preference of white students to avoid desegregated schools.

As the Massachusetts Supreme Judicial Court noted in Opinion of the Justices, 298 N.E.2d 840, 846 (Mass. 1973), a law like Initiative 350 promotes and preserves segregated schools, thus significantly involving the state in encouraging the private racial discrimination reflected in segregated housing patterns.[12]

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[12]The "historical context" of that case parallels the one here:

> [I]t is quite apparent from the bill's historical context that it was designed to prevent the use of bussing as a means of achieving racial balance. Opinion of the Justices, 298 N.E. 2d at 844 (footnote omitted). Nor did the "immediate objective" and "ultimate effect" of the Massachusetts law differ from Initiative 350. By

This Court has applied an identical analysis: "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967)." Norwood v. Harrison, 413 U.S. 455, 465 (1973).

The Court has also declared that it is not relevant that the State's action was "motivated by other than a sincere interest in the educational welfare of all Mississippi children," so long as the action has

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Footnote 12 (cont.)

giving children and their parents an absolute right to attend the nearest or next-nearest school, Initiative 350 uses "state power to promote and entrench racial separation in all those schools whose communities have segregated residential patterns." Id. at 845.

"a significant tendency to facilitate, reinforce, and support private discrimination," Id. at 466. Thus, the State may not take unusual steps merely to "permit a child ... to choose segregation." Goss v. Board of Education, 373 U.S. 683, 687 (1963).

Because Initiative 350 removes traditional governmental control and creates an effective private right to cause and attend segregated schools, it must not be allowed to stand.

D. Initiative 350 is over-inclusive

These appellees join the School District Appellees in their argument supporting the district court's conclusion that Initiative 350 is impermissibly overbroad. Brief of Appellees at 14. Additionally, we note in a separate section of this brief the incorrect factual premise of the State's claim that this defect is cured by the interpretation purportedly

given to it by the State Attorney General. See pp. 51-58, infra.

E. Initiative 350 - was the product of a forbidden purpose

The district court's analysis of the issue of discriminatory purpose correctly applied the Court's teachings in Washington v. Davis, 426 U.S. 229 (1976), Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, and Personnel Administrator of Massachusetts v. Feeney, supra. The district court's findings in support of its conclusion that discriminatory purpose or intent was one of the factors which motivated the adoption of Initiative 350 are amply supported in the record. This issue is thoroughly discussed in the brief of the School District Appellees and needs no further discussion here.

The Claim That Initiative 350 Merely Restored Washington's "Neighborhood School Policy" Is Based Upon a False Factual Premise

The State claims that Initiative 350 is simply a statement to local school districts that the people want the districts to "retain a neighborhood school policy." Appellants' Brief at 8 (footnote omitted). The brief of the United States also refers to Washington's "state-wide neighborhood school policy." United States' Brief at 26-27 n.28. Neither brief cites any authority for claiming the existence of a statewide "policy."[13] None exists.

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[13] Prior to adoption of the Seattle Plan, the Seattle School District generally assigned students to "neighborhood schools" (see J.S. A-22-23, ¶ 7.28), but that practice was not pursuant to a formal policy or part of any state policy. Students were always bussed in large numbers for a variety of reasons to non-neighborhood schools, including for the purpose of desegregating the middle schools under a mandatory program adopted in 1971. The only member of the Seattle School Board

Prior to Initiative 350, rather than a "state-wide neighborhood school policy," Washington had a state-wide policy to eliminate racial segregation from Washington's schools, regardless of the cause of that segregation--a policy incompatible with the claimed "neighborhood school policy." That policy was clearly articulated in the amicus curiae brief filed in the district court by the Washington State Human Rights Commission.[14]

Footnote 13 (cont.)

who opposed the Seattle Plan and supported Initiative 350 testified that she doesn't even know how to define what a neighborhood school is. (Tr. at 1027).

[14]The office of the Washington State Attorney General is well aware of the conflict between Initiative 350 and Washington's policy requiring effective action to eliminate racial segregation and imbalance, having represented the Washington State Human Rights Commission in filing an amicus curiae brief urging the district court to declare Initiative 350 unconstitutional. The present Washington State Attorney General has refused the Commission's formal request for authorization to

The Washington State Human Rights Commission is required by statute to "formulate policies to effectuate the purposes of [the Washington State Law

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Footnote 14 (cont.)

file in this Court a brief by the Commission or any of its members or officers in their official capacities. This refusal, by letter to the Executive Secretary of the Washington State Human Rights Commission from the Washington Attorney General, dated December 9, 1981, was in response to the passage of the following motion, reflected in the Minutes of the Regular Commission Meeting of November 19, 1981:

> [Moved] To request permission from the State Attorney General to allow the agency's Senior Assistant Attorney General to submit an amicus curiae brief supporting the Seattle School District's position related to Initiative 350, And further, if such permission is not granted by the State Attorney General, the Commission will submit a letter, containing the signatures of all five commissioners, to the U. S. Supreme Court requesting the Brief of Amicus Curiae filed on behalf of the Commission with the U.S. District Court, Western District of Washington, in April 1979 be made a part of the Court's deliberation since this continues to be the Commissioners' position on the issue.

Against Discrimination]." Wash. Rev. Code Ann. § 49.60.100.

In passing Wash. Rev. Code Ann. § 18A. 58.245 in 1969, the legislature directed the State Superintendent of Public Instruction to develop rules and regulations for the implementation of inter-district, voluntary programs deemed necessary by the Superintendent to improve racial balance within and amongst school districts. Enacted in 1974, Wash. Rev. Code Ann. § 28A.41.250, further directed the State Superintendent to devise a state-wide plan to assist school districts in developing programs for the relief of children suffering from racial isolation. Pursuant to Wash. Admin. Code § 162-28-030, the public accommodations section of the law against discrimination is made applicable to schools in their relationship with students, including the rights under Wash. Rev. Code Ann. § 49.60.030 to be free from

discrimination because of race. The State Superintendent was further authorized to withhold approval of construction grants to school districts unless such construction would not create or aggravate racial imbalance. Wash. Admin. Code § 180-30-040.

In the Joint Policy Statement of the Washington State Board of Education and the Washington State Board Against Discrimination of April 24, 1970, any school is deemed segregated if 40% or more of the student body consists of one minority race. The two boards adopted a further Joint Policy Statement on November 30, 1973, affirming the state policy to eliminate segregation from the State's schools. The definition of "racial imbalance" adopted by the Seattle School District and utilized in the Seattle Plan was identical to that adopted by the State Board of Education. (Compare J.A. 50 with J.A. 66). A further Joint Policy Statement was issued by the

Washington State Board of Education and the Washington State Human Rights Commission on October 19-20, 1978, reaffirming the policy goal of eliminating racial segregation from the public schools of the State of Washington.[15]

Finally, at its most recent public meeting, January 14, 1982, the Washington State Human Rights Commission unanimously adopted a resolution confirming its continuing position that Initiative 350 conflicts with the Washington State Law Against Discrimination and violates the Equal Protection Clause of the Fourteenth Amendment.[16]

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[15] All three policy statements are attached as exhibits to the Amicus Curiae Brief of the State Attorney General for the Human Rights Commission filed in the district court. The 1978 statement is also set out in full in the Joint Appendix at 65-70.

[16] The resolution is set out in full as an appendix.

Before adoption of the Seattle Plan, the Seattle School District was not only under pressure and the threat of litigation from the Seattle Intervenor Plaintiffs and from the United States Government,[17] but was in obvious non-compliance with the declared State policy to eliminate racial segregation from all of the State's public schools.

Adoption and implementation of the Seattle Plan brought the Seattle School District into compliance with the State's desegregation policy. The district court's conclusion that Initiative 350 "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments," (J.S. A-34), is not seriously contested. Thus, it is

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[17] See Def. Ex. A-118, at 22-35; R. 1278.

evident that instead of restoring a statewide "neighborhood school policy," Initiative 350 was intended to and would destroy the existing statewide desegregation policy.

The State's Argument on Overbreadth Lacks Candor

As its third and independent basis for declaring Initiative 350 unconstitutional, the district court found the initiative overly inclusive because it prohibits school districts from assigning students to achieve racial balance even where the existing segregation was caused by prior governmental action. (J.S. A-35).

The State bases its argument in opposition to the overbreadth rationale upon the claim that "the district court ignored entirely the interpretation of the initiative by the State," which was "stated

clearly in the Trial Brief of State Defendants." Appellants' Brief at 38.[18]

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[18]The State Attorney General has never rendered a clear opinion that any school board believing itself to be under a constitutional duty to desegregate would be unaffected by the prohibitions of Initiative 350. Nor would such an opinion allow a school board to act with assurance. Under Washington law, the courts are not bound by the Opinions of the State Attorney General, which are given only such weight as their reasoning warrants. Kasper v. Edmonds, 69 Wash. 2d 799, 805, 420 P.2d 346, 350 (1966). In the absence of a definitive ruling from the Washington Supreme Court, any school board action within Initiative 350's prohibitions would almost certainly be challenged by the well organized opponents of desegregation. Even if the State's executive branch were to take no action to enforce the Initiative, private persons remain free to seek injunctive relief in a state trial court. As the record forcefully demonstrates, this occurred when private litigants succeeded (even without the assistance of Initiative 350) in persuading a state superior court to enjoin the Seattle School District from implementing its middle school desegregation program in 1971. That trial court decision, although ultimately reversed by the Washington Supreme Court, caused a delay of one year in implementing earlier desegregation efforts. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

The central question in determining whether Initiative 350 is overly broad is whether a local school district, believing itself to be under a constitutional duty to desegregate its schools, can adopt and implement a desegregation program employing the methods prohibited by the statute in the absence of a judicial determination of de jure segregation.

A careful review of all of the State Attorney General's pronouncements on what local school districts may lawfully do under Initiative 350 to remedy de jure segregation, and under what circumstances, compels the conclusion that no opinion has ever been given. Despite a formal request from the State Superintendent of Public Instruction, the Attorney General declined to give any opinion.[19]

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[19] Dr. Brouillet testified at the trial: "We did ask--we did frame a series of questions to the attorney general, on the basis of what we could do, and what we

Footnote 19 (cont.)

could do under 350, and the attorney general did respond to us that, pending the outcome of this case, they wouldn't dispose of those questions." (R. 579.)

The impact of the legal uncertainties created by Initiative 350 on the planning ability of the Seattle School District is illustrated by the following testimony of Seattle School Superintendent Dr. David Moberly, given in response to questions by the attorney for the State:

> A . . . We also have a number of questions that are still not answered in 350 that we have asked the -- through the State Attorney General's Office. We have asked the . . . Attorney General to give us some answers on it because we have a law that we'll be faced with implementing and that raises a series of questions that before complete planning for implementation of 350 can come into effect the Attorney General will have to do his job and answer those.
> Q Have you heard back from the office of the Attorney General? Incidentally, that's my office.
> A Yes, I know.
> Q Have you heard back from them?
> A No, we have not. Whether in recent days he has replied to Superintendent [Brouillet], I do not know but as far as I know at this point the Attorney General has not in any way

If any conclusion can be drawn from the portion of the Trial Brief of State Defendants, quoted in their Appellants' Brief, it is that a local school district cannot, consistent with Initiative 350, undertake a desegregation program in the

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Footnote 19 (cont.)

responded to the State Superintendent's request for answers.

Q. I guess I'm puzzled because I'm aware of having been with the opinions division of that office and they generally decline to offer opinions on matters in litigation.

MR. HALL: That's what they did.

A. Well, how in the hell am I going to plan and be ready if nobody will answer some questions that are very crucial?

Q. Well, the State's position is simple on that. If you want to know how to implement 350, you should have asked the questions first and then started the lawsuit later. Once you start the lawsuit and challenge the law we are sort of hamstrung.

A. Well, we're all in a dilemma right now.

(Def. Ex. A-118, at 70-73; R. 1278).

absence of a judicial declaration of a constitutional duty. According to that "clear statement":

> [W]here a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. The Initiative clearly contemplates in Section Six that its action will be upheld by any court of competent jurisdiction, assuming that such constitutional duty is found to exist. Until a given school district reaches that point, however, it must, as a municipal corporate creature of the State of Washington, attempt to achieve its goals within the limitations imposed by its own creator.

Appellants' Brief at 38 [emphasis added].

Clearly, "that point" referred to by the State is the point at which a court has declared the existence of a constitutional duty, not the point where the local school board concludes that the duty exists.

In view of the refusal of the State Attorney General to render an opinion on this matter, despite being asked to do so,

the claim that the Attorney General's interpretation has been ignored approaches the bizzare. So does the claim that this phantom interpretation is "well supported by legislative history". Appellants' Brief at 39 n.8.

The State's transcript reference to "legislative history," which consists of testimony of Sam Franklin, one of the CiVIC lawyers who drafted Initiative 350, shows just the opposite of what the Attorney General seems to suggest. That testimony leaves no doubt that the drafters of Initiative 350 intended to make it illegal for a local school board to assign students to schools other than their nearest or next nearest, even if the board believes it has a duty to do so:

> Q (By Mr. Hoge) Adding then Section VI, which specified that the initiative would not have an effect on the adjudication of constitutional issues relating to the public schools, what was your

intention, Mr. Franklin, of how that section would work?

Did you merely mean that if a lawsuit were brought which resulted in a determination that schools were de jure segregated, and that bussing of students was required to remedy that, that the initiative would not interfere?

A That would be one application. I suppose another application, very simple, would be if the district felt that 350 was not constitutional, it would simply disobey the state law and take their chances.

Q Would that be disobeying a state law if the district felt it was unconstitutional?

A Yeah, it would be disobeying state law in response to a higher law, I presume, if they are right, they better be right.

Q How would they find out if they were right?

A Someone would sue them, I guess.

Q Would there then have to be litigation for the purpose of determining whether the de jure segregation in the school district was to such an extent to require bussing of students?

A I suppose there would have to be litigation, ultimately, if they chose to disobey the law.

Q Whether initiated by people in favor of bussing for desegregation, or whether it was initiated by people opposed to that concept?

A Whoever.

(R. 1180-81) [emphasis added].

Since the State Attorney General will have the opportunity to further clarify the matter in a reply brief, or in oral argument before the Court, it may be helpful to outline the questions that have yet to be clearly answered:

1. Is a school board, which believes it has a constitutional duty to remedy racial segregation, permitted to make school assignments prohibited by Initiative 350 without violating state law?

2. Must such a school board initiate an action for a judicial determination of its constitutional duty to remedy racial segregation? If so, who would be the parties, what would be the issues, what would be the burden of proof, and who would bear that burden?

3. Must such a school board first persuade the county prosecuting attorney and/or the State Attorney General that it

has such a constitutional duty before it is free to make school assignments prohibited by Initiative 350?

4. Must such a school board attempt to cure the constitutional violation through means consistent with Initiative 350 before employing means prohibited by the Initiative, even if the board believes such permitted means would not be effective? If so, how many years of ineffective efforts would be required before the board could employ methods prohibited by Initiative 350? Would that determination need the approval of the county prosecuting attorney, the State Attorney General, the Court?

5. Must such a school board make a formal finding of its (or its predecessor's) prior violation of the Constitution before making assignments prohibited by Initiative 350? If so, does Washington's Open Public Meeting Act (Rev. Code of Wash.

Ann. Ch. 42.30) require that such a finding be made after public deliberations?

6. If an action is commenced in a state superior court to enjoin a school board from making assignments prohibited by Initiative 350, must the school board prove its own (or its predecessor board's) violation of the Constitution? Must it prove that there are no effective means for remedying the violation except those prohibited by Initiative 350?

7. Can a school board's finding of a past violation of the Constitution by itself or a predecessor board be used against the board or its members in a private action for damages caused by such a violation? Can such a finding be used as evidence in cases charging racial discrimination in other circumstances, e.g., employment discrimination?

8. If a school board finds that it or a predecessor board violated the Constitution, but a later judicial declaration is made that no such violation occurred, can the board's judicially declared violation of Initiative 350 be used against the school district, or the school board's members in a private action for damages caused by such a violation of Initiative 350?

9. Does Initiative 350 repeal by implication the policies of the State Superintendent of Public Instruction and the Washington State Human Rights Commission requiring that racial segregation be eliminated by "whatever means necessary" from Washington's schools, regardless of the cause?

These appellees maintain that the very fact that questions such as these need asking illustrates the deterrent effect of

Initiative 350 on local school officials seeking to fulfill their duty under the Constitution.

Initiative 350 Conflicts With the National Policy of the Equal Education Opportunities Act of 1974

The State argues that "Initiative 350 is nothing more than a state-level legislative parallel to an earlier 1974 act of Congress establishing a national neighborhood schools policy." Appellants' Brief at 35. The State then quotes what it claims to be "[t]he relevant provisions of that Act." Id.

The State fails to quote the most relevant provisions of that same federal statute:

> Denial of equal educational opportunities prohibited
>
> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by --
>
> . . . .
>
> (b) the failure of an educational agency which has formerly practiced

> such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

20 U.S.C. § 1703(b).

> Voluntary adoption of remedies
>
> Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency.

20 U.S.C. § 1716.

As the provisions of the Equal Educational Opportunities Act of 1974 quoted above clearly demonstrate, it is not only the mandate of this Court, but the policy of Congress to encourage local school authorities to desegregate to avoid recourse to the federal courts. Initiative 350 conflicts with basic national policy by

interfering with the power of local school boards to voluntarily desegregate public schools.

The United States Has Compromised Federal Civil Rights Enforcement and Has Forfeited Its Entitlement to the Status of a Party

In the first litigation involving racial segregation in a major northern school district, the Department of Justice noted, "[t]he United States has participated in every school desegregation case which this Court has heard on the merits since Brown I."[20] After Keyes, the Department of Justice continued to enforce vigorously the rights of minorities to equal protection of the law as plaintiff, as intervenor plaintiff, and as amicus curiae.[21] The Department of Justice continued that role when, prior to

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[20] Memorandum for the United States as amicus curiae, at 1 n.1, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[21] See, e.g., United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir.), cert.

obtaining party status, it filed an amicus curiae brief in the district court stating:

> In summary, the United States has a duty and obligation to insure that public school students are afforded equal educational opportunities. The voluntary adoption of desegregation plans by local school districts aids the United States in effectuating this enforcement responsibility. As such it is in the interest of the United States to protect the ability of the plaintiff school districts to continue implementation of their desegregation plans.

United States' District Court Amicus Brief at 5.

In the district court and in the court of appeals, the United States urged that

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Footnote 21 (cont.)

denied, 423 U.S. 946 (1975); Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). It should also be noted that the United States participated as amicus curiae in two of the cases that provide a conceptual underpinning to the present case, Reitman v. Mulkey, 387 U.S. 369 (1967) and Hunter v. Erickson, 393 U.S. 385 (1969), urging a position irreconcilable with that now asserted.

Initiative 350 be declared unconstitutional on all of the grounds upon which those courts ultimately so ruled.

The United States' decision to repudiate the position it urged upon the lower courts was made without notice to, or consultation with, the parties the United States had previously committed itself to support. From December 16, 1980, the date of the decision of the Ninth Circuit Court of Appeals, until the United States switched sides, neither the courts nor the Congress made any change in the law which could justify the switch on the basis of a principled constitutional reanalysis of the case. In their zeal to justify their shocking change of position, the authors of the pleadings filed in this Court on behalf of the Government have totally disregarded the rules of the

Court,[22] the Canons of Ethics and the facts of the case.

A. The United States should be denied further participation in this case

The United States was permitted to intervene in the district court on the basis of a motion to intervene under Section 902 of the Civil Rights Act of

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[22]Prior to filing its Brief for the United States, the Department of Justice had sought an extension of time. Contrary to Supreme Court Rule 29.3 the Department failed to serve these appellees with a copy of that request or to otherwise notify them of the intent of the United States to continue to participate in the case as a party. This made it impossible for these appellees to obtain a ruling on the question of entitlement of the United States to so participate in advance of the filing of the United States' brief.

This failure also prevented these appellees from seeking in advance a determination of their objection, on the grounds of professional ethics, to the continued representation of the United States by the Department of Justice. That objection was, however, made directly to and rejected by the Solicitor General prior to the filing of the Brief for the United States.

1964, 42 U.S.C. § 2000h-2. As the language of that statute, its purpose, its legislative history, and its continuous use have shown, the statute permits intervention only on behalf of civil rights plaintiffs. Although the Court has denied the motion of the United States to expand the time for oral argument and for divided argument, the Court's action does not make clear whether the United States is to be permitted to retain its status as a party. For the reasons previously set out in the objection filed by these appellees and in the separate objection filed by the School District Appellees, the United States should be deprived of the status of a party under the circumstances of this case.

Apparently, no direct case precedent exists to aid the parties or the Court in analyzing the propriety of repudiating a position taken as a co-party in the lower courts and attacking that position and the

co-parties previously supported. The situation is totally unlike the great tradition of the sovereign "confessing error" in a criminal case. In such cases, the matter is concluded when the Government chooses to discontinue further use of its power against the defendant. In this case, the matter is not concluded and the Government has turned its power against those with whom it shared a common commitment.

B. The United States' analysis relies upon an erroneous factual premise

The United States asserts that, "there is no evidence that any [de jure] discrimination exists within the state" (United States' Brief at 14), and that, "[t]his case does not involve constitutionally proscribed racial discrimination, because there has been none." Id. at 34. The United States suggests that the Court should not view the case against a backdrop of assumed racial discrimination, but

rather should approach the case with the opposite assumption. This, the United States argues, is because:

> The Initiative's potential for impeding elimination of de jure segregation can be "real" only if there are school districts in the state of Washington that are, and recognize that they are, unconstitutionally segregated. The district court made no such finding. Nor is there any evidence in the record to support such a finding.

United States' Brief at 47.

The United States further asserts that:

> The plaintiff school districts in this action cannot argue that the Initiative impermissibly burdens their duty to remedy de jure racial imbalance because they maintain there is no such segregation in their districts.

Id. at 46 n.44.

These assertions by the United States are wholly refuted by the record and the United States' own analysis demonstrates that "[t]he Initiative's potential for impeding elimination of de jure segregation" is quite "real."

The Seattle School District candidly admits in its brief that:

> The Board was well aware that there was some likelihood a court could find unlawful segregation in Seattle. J.A. 12-13, 16-17, 74, & 127. Although unable and unwilling to examine the motives of its predecessors, the Board was not unreasonable in its perceptions. Faculty assignment practices, for instance, had been similar to those [that] numerous court decisions have deemed to further schools' racial indentifiability. Pl. Ex. 69. Other historical factors, such as drawing of attendance boundaries and student transfer policies, in some instances bore at least surface similarity to the facts reported in Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman (II), 443 U.S. 526 (1979); Keyes v. School District No. 1, 413 U.S. 189 (1973); and similar decisions.

Seattle School District Brief at 4 n.3. This admission is fully supported by and consistent with the testimony of members of the Seattle School Board, itself.[23]

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[23] School Board Member Cheryl Bleakney testified in her written statement as follows:

Footnote 23 (cont.)

> The Board had numerous discussions with our attorneys during the winter and spring of 1977, trying to assess our vulnerability to charges of segregatory acts, and the risks involved in federal court action. I believe we all wanted to avoid such time-consuming and expensive litigation and the likelihood of court intervention in the educational management of our School District. Only one Board member remained unconvinced that our action was necessary to avoid this eventuality. (J.A. 127.)

On cross examination by the attorney for the State, Ms. Bleakney testified:

> Q. In the legal requirements that you were attempting to satisfy, the legal entanglement that you were attempting to avoid, were entanglements from direction of the federal government or private individuals or interest groups here in the Seattle area, were they not?
> A. Could you rephrase that, Mr. Murphy?
> Q. You were afraid you were going to be sued?
> A. Yes.
> Q. You were threatened with suit, in fact?
> A. Yes.
> Q. The suit was coming either from the United States or from private groups, the Seattle Urban League, the N.A.A.C.P., et cetera, isn't that right?

Footnote 23 (cont.)

> A. Yes.
> Q. You were threatened with suit, in fact?
> A. Yes.
> Q. The suit was coming either from the United States or from private groups, the Seattle Urban League, the N.A.A.C.P., et cetera, isn't that right?
> A. Yes.
> Q. So, that you adopted a plan and adopted a formula, a definition of the racial imbalance or racial desegregation, which was designed to avoid that lawsuit?
> A. It was designed to withstand a lawsuit in case we were hauled into court.

(J.A. 12-13.)

Board Member Bleakney went on to testify that, "the overriding [reason for adopting the Seattle Plan] was the consequences of possible court action." (J.A. 17.)

Testifying further with regard to the reasons for the Board's adoption of the Seattle Plan, Ms. Bleakney stated:

> Q. (By Mr. Hall) You took an oath of office when you became a School Board member?
> A. Yes, sir.
> Q. To, among other things, defend the Constitution of the United States and of the State of Washington?

If evidence of unlawful segregation beyond the admissions of the Seattle School Board itself were required, the record contains it, even though such evidence was excluded from "Phase I," when the case was bifurcated without objection by any party.[24] The United States' claim that

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Footnote 23 (cont.)

> A. Yes, I did.
> Q. To what extent was that a material factor in regard to the decision to adopt the Seattle Plan?
> A. For me, it was a factor, because after my readings of court cases involving other school districts, particularly in the northern United States, I felt we had a constitutional obligation to desegregate, and I felt an obligation to follow that dictate.

(J.A. 74.)

[24] In the district court, the Complaint in Intervention of the Seattle Plaintiffs, at 11-17, alleged specifically that the racial segregation existing in the Seattle School District prior to adoption and implementation of the Seattle Plan was a direct result of purposeful acts and omissions of prior Seattle school boards. The Complaint in Intervention of the East Pasco Neighborhood Council Plaintiffs, at 3-4, made similar allegations with respect to racial

no such evidence exists in the record is particularly troubling in view of the prior administrative actions of the United States government against the Seattle School District. For example, the affidavit of Marlaina Kiner, Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare

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Footnote 24 (cont.)

segregation within the Pasco School District prior to implementation of a desegregation program in that city. Indeed, the United States Department of Justice indicated its intention to assist in the presentation of proof of past purposeful discrimination if necessary.

From the outset, the Seattle School District also alleged and maintained that racial imbalance in the district is substantially due to segregated housing patterns in the City of Seattle which are "the direct result of the racially discriminatory past actions of constituent parts or agencies of the governments of the State of Washington and the United States of America, and of private persons and entities licensed by and subject to governmental regulation." Complaint at 25.

outlines portions of that history, including the Seattle School District's admitted practice of assigning minority teachers to identifiably "minority schools":

> In early 1975, the Seattle School District made application for "basic" and "pilot" ESAA money for school year 1975-76. Regional OCR made a recommended determination, in connection with those applications, that the District was ineligible for ESAA funding as a result of discriminatory assignments of teachers to schools, and failure to adequately identify and serve limited English-speaking national origin minority students. . . . As a result of the District's failure to submit an ESAA waiver application, I sent a letter to the District on July 28, 1975,

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Footnote 24 (cont.)

The district court bifurcated the proceedings and limited the evidence in "Phase I" to Initiative 350's "facial" constitutionality. The proof of the intervenors' allegations of past purposeful segregation was reserved to "Phase II", which was not reached because of the district court's ruling in "Phase I". The United States supported and participated in the bifurcation of the case. It is, therefore, inappropriate for the United States to ask the Court to infer a factual conclusion from the absence of evidence that was excluded by a procedure adopted without objection from any party.

> notifying it that it was in violation of Title VI of the Civil Rights Act of 1964 because of the same discriminatory faculty assignment practices which had rendered it ineligible for ESAA funding. My Office sought the District's voluntary compliance for seven (7) months, from July 28, 1975 but failed to secure an acceptable faculty desegregation plan. On March 1, 1976, the General Counsel of HEW commenced administrative enforcement proceedings against the District under Section 602 of the Civil Rights Act of 1964, based in part on the faculty assignment violation. On May 17, 1976, I signed an agreement with the District adequately resolving the faculty assignment violation and promising speedy desegregation of the certified staff in the District.

(Pl. Ex. 69, at 4-5; R. 691, 692). The Marlaina Kiner affidavit continues:

> Beginning in the Fall of 1976, following the May 1976 OCR-District agreement on desegregation of faculty, discussions within the Seattle District began anew as to the issue of student desegregation. (Id. at 6.)

Those discussions as well as the investigation of the formal administrative complaint of the N.A.A.C.P., Seattle Branch, alleging past purposeful segregatory acts by the

Seattle School District (attached to Pl. Ex. 69, at 12-15) were ultimately deferred by the written Memorandum of Agreement (also attached to Pl. Ex. 69, at 16-20) between the Seattle School District and the Office for Civil Rights, following adoption of the Seattle Plan.

The denial by the United States of the existence of unlawful segregation in the Pasco District is most troubling. As noted earlier, even the State of Washington points in its brief to the glaring "invidious and intentional racial discrimination" that is a part of the history of that city.[25] That history flows in large measure from a segregated housing pattern actually created by the federal government

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[25] See, supra, at 12, quoting the State's Post Trial Brief in the district court asserting that the state defendants believe that Pasco's original segregation was "invidious and intentional."

when it selected Hanford as the site for the production of plutonium for the Manhattan Project in 1943. Employment opportunities for that project brought blacks to the Tri Cities. Richland was then a federal government-owned town and under rigid federal housing regulations which excluded blacks. (J.S. A-9, § 4.1) The Pasco Intervenor Plaintiffs/Appellees correctly state in their brief, at 20 "[t]here can be no genuine dispute about the constitutional duty to maintain a mandatory student assignment program in Pasco, considering the pattern of school construction."

CONCLUSION

The adoption and implementation of the Seattle Plan was the result of many factors including the courage and wisdom of local school officials. However, in the final analysis, the impetus for action was

the certainty that federal court intervention would be the price of inaction.[26] Local school boards throughout the nation will look to the decision in this case to see if the Court's past demand for positive local leadership will be coupled with support for a board that took the Court at its word.

For the reasons stated herein, and in the briefs of the School District Appellees and the various amici supporting affirmance, Initiative 350 violates the United States Constitution. It must, therefore, fall. The decision of the court of appeals should be affirmed.

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[26] A. Siqueland, Without a Court Order: The Desegregation of Seattle's Schools, (1981), at 185.

DATED this 25th day of January, 1982.

Respectfully submitted,

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APPENDIX

WASHINGTON HUMAN RIGHTS COMMISSION

R E S O L U T I O N

WHEREAS, the Washington State Human Rights Commission has exercised its authority under RCW 49.60 by adopting WAC 162-28-030 to deal with discrimination in public schools; and

WHEREAS, the Washington State Human Rights Commission and the Washington State Board of Education signed a Joint Policy Statement in 1970 and jointly revised the Statement in 1973 and 1979 on school desegregation; and

WHEREAS, the Joint Policy Statement of the Washington State Human Rights Commission and Washington State Board of Education declares that it is incumbent upon the public schools in Washington State to develop programs which lessen the effect of racial prejudice and segregation and that it is the responsibility of school boards to assign pupils to buildings in ways which result in the desegregation of the public schools; and

WHEREAS, it is the position of the Washington State Human Rights Commission that the attempts of the Seattle, Tacoma and Pasco School Districts to desegregate the public schools in the State of Washington through mandatory pupil reassignment were made in part to comply with the Washington State Law Against Discrimination; and

WHEREAS, it continues to be the position of the Washington State Human Rights Commission that Initiative 350 conflicts with the Washington State Law Against Discrimination; and

WHEREAS, it continues to be the position of the Washington State Human Rights Commission that Initiative 350 is invalid because it violates the Equal Protection Clause of the 14th Amendment of the United States Constitution; and

WHEREAS, at its duly constituted public meeting in Seattle, Washington on December 17, 1981, the Washington State Human Rights Commission voted affirmatively to write a Resolution stating that

> "...the Commission feels that Initiative 350 is inconsistent with the State Law Against Discrimination for the same reasons stated in the 1979 Brief of Amicus Curiae on this subject; that the Commission's position as stated in the 1979 Brief remains their position today..."

NOW, THEREFORE, BE IT RESOLVED, that the Washington State Human Rights Commission affirms its opinions and positions as set forth in its 1979 Brief of Amicus Curiae, filed in the United States District Court, Western District of Washington, in the case of Seattle School District No. 1, et al. v. State of Washington, et al., Case No. C-78-753; and

BE IT FURTHER RESOLVED, that the Washington State Human Rights Commission affirms its position that school desegregation is essential in order to comply with the Washington State Law Against Discrimination; and

BE IT FURTHER RESOLVED, that it is the position of the Washington State Human Rights Commission that Initiative 350 is inconsistent with the State Law Against Discrimination.

Signed this 14th day of January, 1982.

/s/
SYMONE SCALES, CHAIRPERSON
Washington State Human Rights Commission

/s/
JOE TRIM, MEMBER
Washington State Human Rights Commission

/s/
RITA DURAN, MEMBER
Washington State Human Rights Commission

/s/
RON TAKEMURA, MEMBER
Washington State Human Rights Commission

/s/
EDITH KOGENHOP, MEMBER
Washington State Human Rights Commission

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NO. 81-9

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF OF PASCO INTERVENOR APPELLEES

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Questions Presented

1. Is Initiative 350 unconstitutional?

2. If Initiative 350 is constitutional, does its mere existence raise a case or controversy between a school district seeking to desegregate its schools pursuant to a perceived obligation to do so, and the State of Washington?

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Statement

This brief is filed on behalf of the East Pasco Neighborhood Council and a number of individual residents of East Pasco, all of whom will be referred to as the "Pasco Intervenors."

Pasco is a small city in southeastern Washington State. Prior to 1965, the Pasco elementary schools were segregated. Almost all of Negro elementary school children attended a single elementary school in East Pasco, east of the railroad tracks that divide the city. Most of the white children in Pasco attended more modern schools in West Pasco. (J.A. 51-52)

In 1965, without a court order, the Pasco School District adopted a student assignment plan to equalize pupil population by race and socio-economic background. The East Pasco elementary school was closed, and the East Pasco

elementary students were thereafter transported to West Pasco. (J.A. 52) A new elementary school was later constructed in West Pasco. The school was located at least in part in recognition of the fact that there was a student desegregation program being carried out. (J.A. 33-34)

There has never been any effort by the state, the county, the federal government, or any government entity to terminate the Pasco desegregation program. (J.A. 36) Even after passage of Initiative 350, no government official or private individual threatened to attempt to terminate the Pasco desegregation program. (J.A. 36) Passage of Initiative 350 in 1978 caused the Superintendent of the Pasco School District to believe, however, that the thirteen year old Pasco desegregation program could not continue. (J.A. 31) The

Pasco School District therefore joined with the Seattle and Tacoma school districts in this action against the State claiming that the Initiative was unconstitutional. (R. 1)

The plaintiff school districts did not limit their challenge to the unconstitutionality of the Initiative. They went further, to allege that school segregation resulted from "racially discriminatory past actions of constitutent parts or agencies of the governments of the State of Washington and the United States of America." (Complaint, R. 1, paragraph 30; relating to the Seattle School District but joined in by Pasco School District at paragraph 49.) The School Districts alleged that desegregation was "legally required." (Complaint paragraph 1.) They alleged that Initiative 350 would unconstitutionally interfere in the "performance of their duty

as affirmed in their oaths of office. . . ." (Complaint paragraph 44.) They alleged that Initiative 350 would prevent school directors and administrators "from fulfiling their constitutional duties and from carrying out their oaths of office to support and maintain the Constitution of the State of Washington and the United States." (Complaint paragraph 47.) They argued that the duty is obvious and beyond question:

> While on the record now before the court, and without judicial holding on the issue, it is difficult to show plaintiff school districts had any duty to desegregate its schools, but the facts do show, for example, (a) segregated schools in Seattle, and (b) segregated housing patterns. Unless both of these phenomena occurred through some unknown process akin to immaculate conception, it seems reasonable to conclude they involve constitutional concerns of great magnitude. The Initiative will thus interfere with any duty the District has to desegregate its schools.

> [Plaintiffs' Second Memorandum in Support of Motion for Preliminary Injunction, page 23.]

The Pasco Intervenors moved to intervene in the litigation on the grounds that, although the Pasco School District had undertaken to prove that it had a constitutional duty to desegregate its schools, the School District could not be expected to allege and prove its own intentionally discriminatory acts, practices and ommissions. (R. 72)

The District Court divided the case into two phases. (J.S. App. B-2) "Phase I" involved the constitutionality of Initiative 350. "Phase II" was to resolve the question of whether the School Districts were obligated to maintain desegregation programs, even if the Initiative was found to be constitutional.

As the action progressed, the State Attorney General filed various papers with the District Court stating that, notwithstanding the passage of Initiative 350, it was proper for the plaintiff School District to carry out a perceived constitutional duty to desegregate its schools, without first seeking court approval:

> [As construed by the Attorney General, Initiative 350 does not apply] where a school district is constitutionally required to assign students elsewhere. . . . [Brief of State Defendants in Opposition to Motion for Preliminary Injunction, R. 68, page 4.]
>
> Thus, where a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. . . . [Id. at 27]
>
> Initiative 350 only inhibits assignment of students away from schools nearest or next nearest their home. That is all. Even this inhibition, however, must give way to constitutional imperatives which may override. . . . [Id. at 54.]

> [P]laintiffs repeatedly assume, for purposes of their own argument, that Initiative 350 must be interpreted in a fashion which conflicts with the provisions of the United States Constitution (notwithstanding the position taken before the Court by the state's chief legal officer, the attorney general, to the contrary). . . . [State's brief in response to plaintiffs' first motion in limine, page 8.]

> [I]f constitutionally required to do so, school districts could assign students to other than their nearest or next-nearest schools to remedy de jure segregation without a court order. . . . [State's answers to plaintiffs' first interrogatories and requests for admissions, page 9.]

It further appeared that the authors of the Initiative, CiVIC, agreed that school districts did not have to initiate litigation to establish their constitutional rights and duties before proceeding with a desegregation plan:

> Nor does Section 6 require, and it was not intended to require, school districts or minorities to initiate litigation to establish their con-

> stitutional rights or duties. Section 6 is superfluous and was added simply to make clear what is the law. [Intervenor Defendants' Memorandum in Response to Plaintiffs' Motions In Limine to Exclude Evidence, page 5]

Pasco Intervenors therefore filed a Suggestion of Lack of Jurisdiction (R. 215) pointing out that there had never been a genuine and immediate threat by the state to attempt to terminate Pasco's desegregation program, and that, on the contrary, the State had repeatedly acknowledged the right of the Pasco School District to carry out its perceived constitutional duty to desegregate, without first obtaining a court order. Pasco Intervenors argued to the District Court that the so-called "second phase" would involve litigation by the Pasco School District against an opponent (the State) that had never expressed disagreement with the School District's actions.

The District Court concluded that there was a justiciable controversy, stating that the "mere existence of this statute, accompanied by the potentiality of enforcement action, presents a real and immediate threat of injury." R. 375. The Court of Appeals affirmed the District Court's ruling on justiciability.

Summary of Argument

Initiative 350 is unconstitutional for the reasons stated by the District Court, and because it has the genuine and immediate effect of preventing school administrators from voluntarily taking action designed to assure equal protection of the laws. If the Initiative is not unconstitutional and does not have that effect, then there is no justiciable case or controversy at this time requiring further litigation between the Pasco School District and the State.

ARGUMENT

I.

Initiative 350 Is Unconstitutional

Initiative 350 is unconstitutional for the three reasons expressed by the District Court. First, the Initiative creates a classification based upon race without compelling justification. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Hunter v. Erickson, 393 U.S. 385 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964). Secondly, the Initiative has a disproportionately adverse impact on racial minorities, and its adoption was at least in part an intentionally discriminatory act. Washington v. Davis, 426 U.S. 229, 239-41 (1976); Keyes v. School District No. 1, 413 U.S. 189, 205, 208 (1973). Thirdly, the Initiative is overbroad, purporting to outlaw student reassignment in the absence of a

court order even where such reassignment is constitutionally required. See Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1969); Severson v. Duff, 322 F. Supp. 4 (M.D. Fla. 1970); Scott v. District Attorney, Jefferson Parish, State of Louisiana, 309 F. Supp. 833 (E.D. La. 1970), aff'd, 437 F.2d 500 (5th Cir. 1971).

In spite of the facial neutrality of the Initiative, the statute is nothing more than a negative pregnant with the clear and solitary message that student reassignment shall be lawful except if the purpose is to promote racial balance, integrated education, and a unitary school system that affords equality in educational opportunity. In this sense the statute is no different than that struck down by this Court in

North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). The district court so found, and the court's findings are fully supported in the record.

There is a fourth reason that the Initiative is unconstitutional. The Initiative prohibits assignment of school children for purposes of achieving racial balance in the absence of a court order. This Court on numerous occasions has held, however, that in some circumstances a school district may be constitutionally required to reassign children in order to eradicate the effects of past de jure segregation, even without a court order. Initiative 350 would deter school officials from utilizing such constitutionally required desegregation programs in the absence of a court order. It would prevent or discourage school administrators from voluntarily taking

action to remedy disadvantages resulting from past racial prejudice, and would virtually insure judicial involvement in any school desegregation effort involving student reassignment. It would force both school districts and victims of discrimination to litigate to protect and enforce the constitutional right to equal protection of the laws. That burden on the exercise and enforcement of constitutional rights renders Initiative 350 unconstitutional.

This argument is founded upon four fundamental premises, each of which is deeply embedded in Supreme Court law since 1954. The first of these premises is that separate school systems for different races are inherently unequal. The second premise is that a school district that participates in acts or omissions intended to maintain racial segregation in the schools violates the

constitutional rights of its school children to equal protection of the laws. The third premise is that a school board which supervises a district that has been segregated by the intentional acts of those in authority is under a primary obligation and duty, imposed by the Constitution and not the courts, to move immediately to eradicate the effects of this de jure segregation. Dayton Board of Education v. Brinkman, 443 U.S. 526, 537 (1979); Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969); Green v. School Board of New Kent County, 391 U.S. 430, 435-39 (1968); Brown v. Board of Education II, 349 U.S. 294, 299 (1955). "Judicial authority enters only when local authority defaults." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). The fourth and final premise is that a school board

in some, though clearly not all, circumstances, will be obligated by the Constitution to assign students to schools other than their neighborhood schools, and, if necessary, to provide bus transportation for those students in order to eliminate the effects of de jure segregation. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971); Davis v. Board of Commissioners of Mobile County, 402 U.S. 33 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29-31 (1971).[1]

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[1] This remedy may be required in relatively few cases, as, for example, where school authorities by placement of school facilities have made integration by any other means impossible. This situation has occurred in Pasco since adoption of its desegregation program in 1965. See footnote five, infra. Such circumstances leave transportation of students as the only viable means of eradicating the constitutional violation. "Desegregation plans," as this Court stated in 1971, "cannot be limited to the walk-in school." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30 (1971).

In sum, this Court has established that, even without a court order, in some cases school districts must transport students in order to insure equal protection of the laws. Courts must intervene to impose such a remedy only secondarily, if the responsible state officials abdicate this constitutionally imposed duty.

It follows that a student who is being denied his or her rights should attempt to enforce these rights first by application to the school districts, and only if this effort fails, by application to the courts.[2]

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[2] Approaching a school board to find a solution is less likely than service of a complaint to engender hostility. More importantly, a family attempting to enforce its rights may by negotiation achieve a goal that could cost tens or hundreds of thousands of dollars, and years of time and effort, to achieve through litigation. The volumes of the United States Reports are replete with enormously expensive multiparty desegregation cases that have been proceeding for more than half a decade. Resolution through voluntary, non-judicial processes is the most inexpensive and efficient way to proceed.

Initiative 350, by plain language, prohibits assignment of students to other than the nearest or next nearest school for purposes of achieving racial balance, except in compliance with a court order.[3] The Initiative thus infringes upon the mandate of the Constitution by preventing school districts from complying with their obligations -- totally independent of court order -- to remedy past de jure segregation, and by foreclosing to victims of racial preju-

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[3] The Initiative thus shifts the burden of proof from the opponents of a desegregation program to the proponents. If the Initiative means what it says, before conducting a desegregation program involving mandatory student reassignments, a school district must undertake to prove, in a court action it initiates, that it has a duty to desegregate, and that a busing program is the appropriate method to do so. This is the virtual reverse of how the system should work. Litigation on these issues should be discouraged. The federal courts should avoid desegregation litigation to the extent they can. The states and their school districts should be encouraged to solve their problems without the primary involvement of the federal courts.

dice the most efficient and least expensive method of restoring their rights.

It is irrelevant to the constitutionality of Initiative 350 that it might be interpreted, not as it reads, but as the State of Washington has insisted it should read, to permit busing for racial balance wherever constitutionally required, even without a court order. Even so interpreted, the effect of the law on the actions of school officials would be the same -- school officials would in all likelihood decline to institute or continue busing programs in the absence of a court order.[4] The existence of an obligation to remedy de jure segregation depends upon the complex history of conduct

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[4] That is apparently what would happen in this case if the Initiative is upheld. The school administrators of the Pasco and Seattle school districts testified that they would feel compelled to terminate their programs if the Initiative was allowed to stand. (J.A. 31, 75.)

related to race in a school district, and on the past and present actions of state and local administrative officials. Termination of racial balancing programs because of Initiative 350 is the more clearly marked pathway. Any school official genuinely concerned with obeying state law -- as most surely are -- will find it much easier to take a passive posture rather than invite litigation from antibusing parents or from the state. Planning for desegregation programs is obviously more difficult if done in the face of a statute that, if it means what it says, prohibits such programs without a court order, and invites the intervention of those opposed to busing.

Under the law as explicated by this court since Brown, de jure segregation exists only where intentional official action has caused or contributed to

segregated schools. School officials thus could not voluntarily institute a plan to achieve racial balance, even under the Washington Attorney General's interpretation of Initiative 350, without admitting, by words or deeds, that there has been a discriminatory governmental purpose leading to segregation of the schools.[5] It does not reflect ill on

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[5] Because of the peculiar circumstances in Pasco, it may be easier for the school administrators to acknowledge the duty to continue the transportation program. The East Pasco elementary school was closed in 1965, and after the busing program was developed, new schools were constructed in West Pasco. This was done in part in recognition of the student transportation program. (J.A. 32-36.) The effect of termination of the busing program because of Initiative 350 would be to worsen the stituation from that which existed prior to 1965. Hispanic, Asian, Negro and American Indian students would be concentrated in older schools to the east, but outside their neighborhoods. The white students further to the west would be assigned to the newer schools within their neighborhoods. (J.A. 51-56.) There can be no genuine dispute about the constitutional duty to maintain a mandatory student assignment program in Pasco, considering the pattern of school construction. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971).

public school officials to suggest that they will be reticent to make such admissions. In the absence of Initiative 350, Pasco school officials voluntarily instituted busing programs to cure de jure segregation, but in doing so they did not have to call themselves racists. Appellants' suggestion that the more liberal interpretation of the Initiative will cure its constitutional problems is thus disingenuous; school boards would simply be unwilling to reassign students in the face of the Initiative's prohibition without a court order requiring them to do so.

A statute that flatly prohibits assignment of students to achieve racial balance, except as permitted by court order, will almost certainly prevent voluntary initiation of such programs even when they are perceived by school officials to be required by the Consti-

tution. It will discourage -- indeed prevent -- school officials from attempting to satisfy their obligations under the Constitution, and it will force school districts and affected individuals into years of litigation to assure equal protection of the laws.

The courts are not lone sentinals guarding the rights of citizens to equal protection of the laws. Every citizen is entitled to equal protection, without first obtaining a court order, and every state official is obligated to ensure that the citizens of the state receive equal protection, without first being served with a court order. Initiative 350 has the effect of preventing or discouraging school administration officials from voluntarily taking action designed to assure equal protection of the laws. As such it improperly burdens the exercise and enjoyment of constitu-

tional rights, and violates the Equal Protection Clause of the Constitution.

II.

If the Initiative Is Constitutional, There Is No Justiciable Case or Controversy

If the Court concludes that despite Initiative 350, the Pasco school administrators may continue to reassign students to achieve racial balance as required by the Constitution, and if the Court concludes that the Initiative does not have the effect of preventing or discouraging the Pasco school administrators from voluntarily taking action designed to assure equal protection of the laws, then there is no justiciable case or controversy between the Pasco School District and the State of Washington, and the Pasco School District complaint should be dismissed.

Justiciability is a legal concept without fixed content or susceptibility

to verification. Poe v. Ullman, 367 U.S. 497 (1961).

> The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, and not hypothetical or abstract.'

Babbitt v. United Farmworkers National Union, 442 U.S. 289, 298 (1979). Adherence to the requirement insures that the issues in a lawsuit will be thoroughly framed and vigorously contested. The presence of injury to the plaintiff is the keystone of the justiciability requirement.

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently

> held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.
>
> Moreover, when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily. . . . [C]oncrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-21 (1974). Actual injury or the immediate threat of actual injury is a firm and

longstanding prerequisite for constitutional adjudication by a federal court. Massachusetts v. Mellon, 262 U.S. 447 (1923); Stearns v. Wood, 236 U.S. 75 (1915).

If the Initiative meets constitutional requirements and does not prevent or discourage the Pasco school administrators from reassigning students as required by the Constitution, then the Pasco school district has sustained no actual injury in this case by the mere existence of the Initiative. No one has even threatened to attempt to utilize the statute to terminate the Pasco plan. The Pasco school district has not been called upon to terminate its student assignment program. Compare Lake Carrier's Association v. MacMullan, 406 U.S. 498, 507-508 (1972). It is entirely speculative at this time whether a real controversy may develop as to

Pasco's programs. So long as the Pasco School District is free to continue its voluntarily undertaken desegregation program, without fear of violation of the statute if it does so, there is no issue requiring "Phase II" of this lawsuit.[6]

The mere possibility of an attempt to terminate the Pasco program because of Initiative 350 does not constitute the immediate threat of enforcement necessary to justify resolution by a

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[6] In Sea Ranch Ass'n v. California Coastal Zone Conservation Commissions, 537 F.2d 1058, 1063 (9th Cir. 1976), the court pointed out that an allegedly unconstitutional statute clear on its face could be challenged without awaiting its application or threat of application, since the very existence of the restriction created the necessary case or controversy as to any party having standing to challenge it. The court pointed out, however, that where the constitutional question presented to a federal court turns on the specific application of the statute, no case or controversy is presented absent some indication that the plaintiffs' rights had been subjected to a real and immediate threat. Applying the Sea Ranch analysis here, if the Initiative is constitutional "on its face," then a real and immediate threat will be necessary before "Phase II" is justiciable.

federal court of the constitutional issues proposed to be tried in Phase II of this litigation.

> A long line of cases holds that federal courts may not decide suits in which the adversity of the parties rests on the happening of some event whose future occurrence is in doubt. This rule effectuates several sound policies. It conserves judicial energies for litigants who have a real need for official dispute resolution; it ensures a concrete and adverse presentation of factual and legal issues to protect against ill-advised adjudication; and it restrains the judiciary from injecting itself into the affairs of the legislative and executive branches.

Kidwell v. Meikle, 597 F.2d 1273, 1289 (9th Cir. 1979).

The possibility of an attempt to terminate the Pasco program is in serious doubt. No state official has threatened "enforcement" against Pasco.[7] Neither

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[7] It is unclear what "enforcement" would be. The statute contains no enforcement provisions and no penalties.

the State nor CiVIC was interested in the Pasco program until Pasco joined in this lawsuit.[8] No party to this lawsuit has contended that Initiative 350 should be read and applied literally. The state has consistently taken the position that a state or school district has an obligation to cure the effects of de jure segregation, and that the Initiative should be read to permit such

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[8] Although the complaint sought relief on behalf of three school districts, including Pasco, the complaint did not, aside from identifying the Pasco school district, devote even one sentence to a discussion of the history of the desegregation program in Pasco. As the case developed, the reasons for this absence of detail became clear. There was no evidence that the State of Washington, or CiVIC, or any proponents of Initiative 350, or any opponents of busing in Seattle, or anyone else had any desire to bring an end to the Pasco desegregation program. The record indicated that CiVIC drafted Initiative 350 entirely in response to the Seattle plan, and the District Court so found. (Findings of Fact 7.1-7.9, R. 393.)

action even in the absence of a court order.[9] If the State were to seek in some way to enforce the statute in Pasco, its first step, necessarily, would be to examine the history of the school district to ascertain if such an obligation exists. The State could conceivably conclude that the program was constitutionally unwarranted, and it might start an action to compel its termination. Alternatively, the State might choose to simply accept the judgments of school administrators, and

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[9] The State maintains this position in its brief on this appeal. See Appellants' Brief, pages 38-39:

> The appellants -- charged by the Complaint with enforcement of Initiative 350 -- have insisted from the outset upon a construction of the statute which recognizes and provides for the constitutional necessity to undertake mandatory desegregation steps in certain instances without first having to seek an authorizing court order of some sort.

avoid a dispute. Or the State might conclude that the current desegregation program, or some revised program,[10] is necessary to comply with dictates of the Constitution. Following investigation, the State might actively support an amended Pasco desegration program, and oppose any effort to terminate the desegregation efforts. Considering the many different possibilities, the threat of "enforcement" is not sufficiently genuine and immediate to create a case or controversy justiciable by the federal courts.

The case or controversy issue is of more than academic importance. If the

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[10] In arguing that no burdens are imposed on minorities by Initiative 350, the State in its brief alleges that the Pasco plan is subject to termination because only the East Pasco children are transported. Appellants' Brief, pages 15-16. Under the circumstances, a "two-way" transportation system might be required. The federal courts should not address the issue, however, until a real case or controversy is presented in that regard.

Initiative is found to be constitutional and if the complaint is not dismissed, the case would apparently proceed to "Phase II" at which time the Pasco School District would undertake to prove that it was, and is, obligated to re-assign students in order to desegregate its schools. This would apparently occur even though the defendant has never denied the existence of that obligation, and even though it has repeatedly indicated that if there is a duty to desegregate the schools, plaintiff should "certainly" do so. The district court would be asked to approve the Pasco student assignment policies even before any dispute developed concerning those policies. While the school officials might well believe that they had such a duty, they could not be expected to energetically advocate their own culpability, so the presence of the

Pasco Intervenors would be necessary to assure that the burden of proof was carried. A massive, time consuming and expensive multiparty lawsuit would result, even though there was no genuine controversy to generate it.

The Ninth Circuit addressed the justiciability issue, and concluded based upon four factors that the case was justiciable. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338, 1342 n.1 (9th Cir. 1980). Pasco Intervenors assert that the Ninth Circuit in so concluding misconstrued the case as it relates to Pasco.

First, the Court of Appeals noted that "this is a highly specific statute, clearly applicable to Pasco's student assignment policies". The statute may indeed be specific in some sense, but it is emphatically not applicable to Pasco's school assignment policies. If

this statute is interpreted in the manner in which the State Attorney General in its brief has indicated that it should be interpreted, then the statute clearly would not be applicable to a constitutionally required busing program.

The Court of Appeals observed, secondly, that Initiative 350 is a recent statutory enactment and "not a law which has lain moribund for years." Pasco Intervenors suggest that the age of a statute has little bearing on the likelihood that it would be applied in such a manner as to force Pasco to terminate its desegregation program. The law might well have lain moribund for many years, at least as to Pasco, if the Pasco School District had permitted it to do so.

Thirdly, the Court of Appeals stated that parties in a legal status

identical to that of Pasco, meaning, presumably, Seattle, had been the subject of immediate threats of enforcement. By virtue of the history of the enactment of Initiative 350, and by virtue of the almost certain existence of distinctions in the history of racial integration in the two school systems, the Pasco legal status is not remotely like that of Seattle. Threats of enforcement against Seattle, immediate or otherwise, have little bearing on the likelihood of enforcement in Pasco. In any event, the threats of enforcement in Seattle were vague and ambiguous at best. (R. 1, attachment.)

Finally, the Court of Appeals observed that Initiative 350 is a civil rather than a criminal statute, and imposes an affirmative duty to comply. In support of this proposition, the Court of Appeals cited Lake Carriers

Association v. MacMullan, 906 U.S. 498 (1972). That case, however, is obviously different. The court in Lake Carriers found that state authorities had already "sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible." Lake Carriers Association v. MacMullan, supra, 406 U.S. at 507. Here, there has not even been an investigation by the state into the necessity for a Pasco desegregation program, let alone a threat that the Initiative would be "enforced" to obtain compliance as soon as possible in Pasco.

A "Phase II" action to establish the existence of de jure segregation, and to craft a desegregation program to remedy the wrong, places huge burdens on the courts and litigants. This Court should refuse to permit involvement of the federal courts in these sensitive

issues of social and local policy unless and until it is clear that the issues cannot and will not be satisfactorily resolved by the school district and the state without federal court intervention.

Litigation such as proposed for "Phase II" will only be necessary if the Pasco School District fails to carry out its duty to continue to desegregate its schools. This Court should neither require, nor permit, the Pasco School District to force the State or the Pasco Intervenors into desegregation litigation at this time. Instead, this Court should expressly hold that the Pasco School District must proceed in its wisdom in accordance with its perceived duty and without seeking prior approval from the district court. The Pasco School District should not flee until someone pursues it. It should not

Appellee's Brief

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No. 81-9

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In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Does a state statute—Initiative 350—requiring assignment of students to the nearest or next-nearest school embody a suspect racial classification when it contains exceptions for all common forms of student assignment except racial desegregation, specifically prohibits all means of desegregation other than transfers at students' option, and concededly was enacted to terminate a school district's mandatory desegregation program?

2. Does substantial evidence support the finding by the District Court, after nine days of trial that created over 2000 pages of transcript and over 250 exhibits, that discriminatory purpose was a factor in the adoption of Initiative 350?

3. Does a state's prohibition of local school districts' assignment of students to non-neighborhood schools for desegregation, except where ordered by a court, interfere with satisfaction of the affirmative federal duty to desegregate?

4. Does protection of the constitutional rights of school children by school districts, school board members, and private citizens constitute a special circumstance rendering an award of attorney's fees unjust?

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No. 81-9

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

JURISDICTION

Appellants improperly invoke this Court's jurisdiction under 28 U.S.C. § 1254(2) (1976), as to Appellants' Question VIII. *See* note 44 *infra.*

STATEMENT OF THE CASE

A. Introduction

This statement is drawn from the District Court's findings of fact, 473 F. Supp. 996, J.S. A-1 to A-36 (W.D. Wash. 1979), which the Court of Appeals left wholly undisturbed and in many particulars expressly affirmed, 633 F.2d 1338, J.S. B-1

to B-29 (9th Cir. 1980), and from the evidence consistent with those findings. Appellants state as facts many of their contentions rejected by the courts below.[1] Because they have failed to raise any "very obvious and exceptional showing of error," however, this Court should not depart from its steadfast refusal to review such factual findings. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949).

B. Historical Background

The Seattle, Tacoma, and Pasco public school districts have determined that racial desegregation is an important educational goal. The overall education of students in a school system suffers when schools are segregated, and the adverse effects fall most heavily upon minority students. The greater the racial imbalance, the greater the impairment. 473 F. Supp. at 1001 and 1011, J.S. at A-7 and A-25 (Findings of Fact Nos. 3.1 and 3.1(a) (hereinafter, *e.g.*, "FF 3.1")). Since the early 1960's, these public school districts have taken steps to reduce school segregation. *Id.* at 1002-03 and 1005-07, J.S. at A-8 to A-10 and A-14 to A-18 (FF 3.8, 4.3, 5.1, 6.1, and 6.12). Tacoma and Pasco have assigned students to other than their "neighborhood" schools for many years. *Id.* at 1002-04, J.S. at A-9 to A-13 (FF 4.3, 4.4, 5.1, and 5.14).

Because the antibusing statute in question arose mainly in opposition to effective desegregation in Seattle, events there must be recited in some detail. Segregated housing patterns in Seattle result in segregated schools under even a noninvidious neighborhood school assignment policy. *Id.* at 1007, J.S. at A-18 (FF 6.14). During the 1960's and 1970's, the minority residential areas expanded, and racial imbalance in the schools increased. *Id.* at 1006, J.S. at A-17 (FF 6.8); J.A. 75-83 and 144-50; Def. Ex. A-97.

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[1] Contrary to its present contentions, the United States informed the courts below that the District Court's findings accurately reflected the facts.

In 1971, after eight years of limited success with voluntary desegregation transfers, the locally elected Seattle School Board adopted a mandatory middle school desegregation program as a back-up to continued voluntary efforts. Litigation delayed implementation of that program until fall 1972.[2] The program also prompted a nearly successful effort to recall four board members. *Id.* at 1002 and 1006, J.S. at A-8 and A-16 (FF 3.10 and 6.3).

Until the 1978-79 school year, Seattle employed no additional mandatory desegregation strategies, and school segregation increased, except in the middle schools. During 1976-77, the District planned and publicized a voluntary "magnet" school desegregation program, which was carried out in 1977-78. It successfully attracted some new student movement, but much of that movement was not desegregative. *Id.* at 1006, J.S. at A-16 to A-17 (FF 6.5, 6.6, and 6.8); J.A. 111.

In early 1977 several organizations, including intervenor-plaintiffs American Civil Liberties Union, National Association for the Advancement of Colored People, and Church Council of Greater Seattle threatened legal action to force Seattle to desegregate. In April 1977 the NAACP filed a complaint with the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare, charging the District with violating Title VI, 42 U.S.C. § 2000d (1976), by maintaining purposefully segregated schools. 473 F. Supp. at 1005-06, J.S. at A-15 (FF 6.1). OCR scheduled an investigation.

In May 1977 the Mayor of Seattle and the presidents of the local Chamber of Commerce, Municipal League, and Urban League urged the Seattle School Board to adopt a definition of racial isolation and a commitment to its elimination by a time certain. J.A. 139-40. This broad support for locally controlled desegregation was consistent with the

[2] *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

Board's belief as to its educational, moral, and legal duty,[3] and was an important factor in the Board's June 1977 adoption of a resolution defining segregation (*i.e.*, "racial imbalance"[4]) and directing its elimination by autumn 1979 through use of educationally sound strategies. J.A. 49-50. The Board further directed a six-month public planning process. 473 F. Supp. at 1006, J.S. at A-17 (FF 6.9); J.A. 136-38. In July 1977 the Board established equity of movement (*i.e.*, roughly equal numbers of minority and majority students mandatorily assigned to non-neighborhood schools) as an essential feature of acceptable plans. J.A. 127.

C. The Seattle Plan

On December 14, 1977, after a lengthy public process, including analysis of five model plans[5] by a citizens'

[3] The Board was well aware that there was some likelihood a court could find unlawful segregation in Seattle. J.A. 12-13, 16-17, 74, & 127. Although unable and unwilling to examine the motives of its predecessors, the Board was not unreasonable in its perceptions. Faculty assignment practices, for instance, had been similar to those which numerous court decisions have deemed to further schools' racial identifiability. Pl. Ex. 69. Other historical factors, such as drawing of attendance boundaries and student transfer policies, in some instances bore at least surface similarity to the facts reported in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); and similar decisions.

[4] The Seattle Plan's goal to reduce racial imbalance is in no sense a "racial balance plan" directed at achieving the goal of "complete racial balance." Brief for United States at 5. No particular range or ratio of minority to majority students is required. The percentage of minority students in any school may range from zero, *i.e.*, no minority students, to 20% above the districtwide minority percentage, provided that no single minority group is more than 50% of a school's student body. J.A. 50. This is a less demanding desegregation goal than has been directed by numerous court orders reviewed by this Court. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6-10 (1971). *See also McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The Washington State Board of Education and Washington State Human Rights Commission have adopted the same definition of "racial isolation" and have stated it to be public policy to eliminate such "racial isolation" by whatever means necessary. 473 F. Supp. at 1002, J.S. at A-8 (FF 3.11); J.A. 65-69.

[5] Each of the plans relied heavily on mandatory student assignments, either as an initial strategy or as a backup to voluntary strategies. As Board member Cheryl Bleakney testified, the public, while preferring voluntary plans if possible (as did the Board), repeatedly expressed the desire for stability and predictability in student assignment patterns. J.A. 126-31.

committee and over 30 public hearings, the Board by a vote of six to one adopted the Seattle Plan for school desegregation. 473 F. Supp. at 1007, J.S. at A-17; J.A. 141-44. The Plan, which contains elements of several of the model plans, desegregates elementary schools by "pairing" and "triading" minority with majority elementary school attendance areas. Thus, the Plan assigns individual students not on the basis of their race (as in some mandatory and most voluntary plans), but together with all other students in their attendance area. Secondary schools are desegregated by restructured feeder patterns from elementary, to middle, to high schools.

Students thus remain, if they choose, with other students from their immediate neighborhoods in established patterns from grade school through high school. Any inconvenience is equitably distributed, with roughly equal numbers of minority and majority students mandatorily reassigned. Students subject to mandatory assignments spend roughly half of their school years near their homes.[6]

Although the mandatory aspects of the Plan were necessitated by the failure of 15 years of mostly voluntary efforts, the Plan retains as much opportunity for voluntary transfers as in a "voluntary-first" program. 473 F. Supp. at 1007, J.S. at A-17 to A-18 (FF 6.11). Because "voluntary-first" strategies have inherently unpredictable results at the individual student and individual school levels, primary reliance upon them would have required constant readjustments and last-minute resort to virtually random mandatory assignments made purely on the basis of individual students' race, as the Board learned from its experience with the middle schools program. J.A. 88. It is wasteful and self-defeating to make mandatory "backup" assignments of students to programs which have been

[6] The length of bus rides under the Seattle Plan was kept to a minimum. The average "mandatory" bus ride in Seattle is 35 minutes, with 45 minutes maximum. The average "voluntary" bus ride is 40 minutes, with 60 minutes maximum. Roughly half of all students in Seattle take buses to school. Somewhat over half of those students do so as part of the Seattle Plan, with fewer than half of those moving mandatorily.

uniquely designed to attract students with special interests or talents. The "mandatory-first" plan based on pairs and triads permits predictability and stability over time, and has important educational and practical advantages, without sacrificing voluntary opportunities. J.A. 130.

Voluntary programs and transportation are considerably more expensive than mandatory. With the mandatory assignment patterns of the Seattle Plan, a bus can fill up with children at a few central stops in a neighborhood and can take them all directly to the same destination; voluntary student movement is widely scattered and transportation correspondingly far less efficient. J.A. 72. Magnet programs rely on expensive staff, programs, supplies, equipment, publicity, and annual recruiting efforts to attract students. State statutes limit the funds that may be raised by special local property tax levies to spend on such programs. Further, even assuming whites would volunteer in substantially increased numbers, Seattle's minority-area schools lack capacity to absorb enough white students to desegregate, especially since even greater numbers of minority volunteers "out" could not be expected while programs were being enhanced to attract whites. J.A. 120-31.

As the undisputed testimony of black Seattle School Board member Dorothy Hollingsworth and black community leaders established, J.A. 93-96, 191-93, and 196-98; Tr. 218-25, the Board's adoption of the Seattle Plan was the realization, through the local political process, of important minority educational and political goals. Because a voluntary-only plan under Initiative 350 would destroy the Seattle Plan's equity of movement, minority volunteers would significantly decline from previous levels in reaction to the white community's repudiation of desegregation. 473 F. Supp. at 1007, J.S. at A-18 (FF 6.16); J.A. 94-95, 191-93, and 196-98; Tr. 218-25 and 445-55.[7]

[7] This would cripple voluntary desegregation strategies, which rely for their limited success upon a disproportionately high level of minority student transfers. 473 F. Supp. at 1006 & 1010, J.S. A-17 & A-24 to A-25 (FF 6.7, 8.5, 9.1, 10.1, & 11.1).

D. Origin and Passage of Initiative 350

A group of citizens unsuccessfully sought to enjoin adoption of the Seattle Plan, organized Citizens for Voluntary Integration Committee (CiVIC), and then sought to enjoin implementation of the Plan. 473 F. Supp. at 1007, J.S. at A-18 to A-19 (FF 7.1-7.3).

CiVIC also drafted Initiative Measure No. 350 in direct and sole reaction to the Seattle Plan's "forced busing."[8] *Id.* at 1001 and 1008, J.S. at A-6 and A-19 (FF 1.28, 7.4, and 7.9); *see* 633 F.2d at 1343 and n.2, J.S. at B-4. In composing the antibusing initiative, the drafters wrote to all Washington school districts for advice on providing maximum flexibility for "normal" operations, and then satisfied all expressed concerns. 473 F. Supp. at 1008, J.S. at A-19 (FF 7.8); Def. Ex. A-102; J.A. 102-04.[9] The drafters specifically prohibited all the mandatory desegregation strategies of the Seattle Plan and all known mandatory

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[8] The president of CiVIC testified as follows:

> Q Isn't it then an accurate statement to say that Initiative 350 was designed specifically to stop the ... mandatory aspect of the Seattle Plan or any other mandatory plan such as Seattle or other school districts might adopt?
>
> A That's extremely accurate.

J.A. 168.

[9] As to transportation of students for all reasons except desegregation, the legislative co-chair of CiVIC testified: "[W]e tried to cover those in our exceptions." J.A. 189. This CiVIC leader's testimony is instructive, especially since it was taken in one of the earlier lawsuits, soon after the initiative was developed, and long before this litigation alerted the initiative's proponents to the danger of acknowledging that the initiative's only target was mandatory desegregation: "It was our goal to make this initiative as flexible as possible not to interfere with the development of any program in any school district except where they might use mandatory busing." J.A. 188-89.

alternatives. 473 F. Supp. at 1010, J.A. at A-24 (FF 8.3-8.6).[10] The State agrees that "opponents of the plan . . . drafted, filed, solicited signatures for and campaigned for passage of Initiative Measure No. 350 . . . ." Brief of Appellants at 4.

The terms "busing," "forced busing," and "mandatory busing" in connection with Initiative 350 were synonomous with busing for desegregation. 473 F. Supp. at 1009, J.S. at A-21 to A-22 (FF 7.22); Tr. 77-78, 265-66, 349-51, 662, and 715; Pl. Ex. 2, Tr. 22. There is a conscious or subconscious racial factor in at least some opposition to "forced busing."[11] CiVIC's campaign to secure the signatures necessary to place the initiative on the ballot assured that it would affect only "forced busing" and not "traditional" student assignment policies of local districts. 473 F. Supp. at 1008, J.S. at A-21 (FF 7.18). That campaign made clear that the purpose of Initiative 350 was to stop Seattle's mandatory desegregation efforts. *Id.* at 1007-09, J.S. at A-19 to A-23 (FF 7.5, 7.14, 7.19, and 7.23); Pl. Exs. 38-44 and 51-67.[12]

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[10] The president of CiVIC testified as follows:

> Q Isn't it true that [§ 3 of Initiative 350] was devised specifically in response to the Seattle Plan in an effort to enumerate those characteristics of the Seattle Plan which could not be utilized as an indirect method of getting around the prohibitions of Initiative 350?
>
> A I'd have to answer yes.

J.A. 168-69. The CiVIC co-chair, *see* note 9, *supra*, testified that the prohibitions of § 3 were enumerated because

> school districts who are committed to using mandatory bussing to achieve racial integration might very well use another reason for—at least state another reason, you see, for implementing that plan. They might for instance, say that the pairing of schools offered a better education when indeed their goal was really integration if the initiative was directed strictly to a racial integration of schools.
>
> . . . .
>
> If the initiative had been directed to its correcting racial imbalance, if the initiative had said they may not use bussing beyond the nearest or next nearest school to the purpose of correcting racial imbalance, then a school district whose—whose goal might be the integration of the schools could still adopt a pairing plan and say, well, this plan isn't really for integration, it is just to achieve better education. I consider that a not very remote possibility.

J.A. 188-89.

[11] J.A. 91-93, 100-04, & 154-67.

[12] For example, advertisements in major newspapers around the state began: "Initiative 350 was drafted in response to a desegregation plan enacted by the Seattle school board." Pl. Ex. 38, p. 49, Tr. 486.

In July 1978 the election campaign began. CiVIC's spokespersons continued to maintain that the initiative would affect only "forced busing" for school desegregation, and repeatedly stated that 99 percent of the State's 300 school districts would not be affected by the initiative. 473 F. Supp. at 1008-09, J.S. at A-21 (FF 7.18-7.20). The three the initiative would affect are plaintiffs in this action. *Id.* (FF 7.19).

A voters' pamphlet was mailed to all of the State's registered voters. The arguments for Initiative 350 by CiVIC focused on "forced busing." Pl. Ex. 2, Tr. 22. The arguments against the initiative warned that the initiative would return the Seattle, Tacoma, and Pasco public schools to segregation, and made clear that the initiative arose in reaction to Seattle's desegregation program. 473 F. Supp. at 1008, J.S. at A-20 to A-21 (FF 7.13 and 7.14). Both positions recognized that the initiative had one direct and immediate objective: halting desegregative non-neighborhood assignments in Seattle.

The electorate passed Initiative 350 at the November 7, 1978, general election. In Seattle's predominantly minority 37th Legislative District, the initiative failed. *Id.* at 1009, J.S. at A-22 (FF 7.24 and 7.25).[13]

Initiative 350 permits local school districts to assign students to other than their nearest or next-nearest schools for all common reasons except desegregation. *Id.* at 1010 and 1013, J.S. at A-24 to A-25 and A-29 to A-30 (FF 8.3 and 8.8 and opinion).[14] It permits a local community to obtain a desegregated educational experience for its students *only* if a court orders the school district to do so. *Id.* at 1011, J.S. at A-25 (FF 8.9 and 8.10). The initiative would end the

[13] The initiative also failed in the predominantly white 43rd District, which is generally that area of Seattle joined since 1972 with the 37th District in the mandatory middle school desegregation program.

[14] Defendant State Superintendent of Public Instruction testified he was unaware of any "forced busing," other than for desegregation, not encompassed within the exceptions of the initiative. J.A. 96-97.

desegregation programs in Pasco, Tacoma, and Seattle and prevent Seattle from eliminating racial imbalance. *Id.* at 1010, J.S. at A-24 to A-25 (FF 8.5, 9.1, 10.1, 11.1, and 11.2).

E. The Initiative 350 Lawsuit

Prior to Initiative 350's effective date, the Seattle, Pasco, and Tacoma School Districts, board members from those districts, and several individuals as guardians of their student children (the "school district plaintiffs") brought suit charging that Initiative 350 discriminated on the basis of race in violation of state law, the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964, and that the State and the United States had caused purposeful segregation that was reflected in Seattle's schools. R. 1.

A number of parties intervened in the action. The local intervenor-plaintiffs contended additionally that Seattle was guilty of purposeful segregation and that if, as a result of Initiative 350 or otherwise, the District did not voluntarily desegregate, the court should order it to do so. The claims that the State and the United States had caused unlawful school segregation and that Seattle had not adhered to a noninvidious school assignment policy in the past were bifurcated for trial, if necessary, as Phase II of the litigation. The United States intervened as a plaintiff under 42 U.S.C. § 2000h-2 (1976). CiVIC and several individuals intervened as defendants.

F. The District Court's Decision

After nine days of trial, producing over 2000 pages of transcript and over 250 exhibits, the District Court determined that it was

> compelled to find Initiative 350 unconstitutional upon several grounds: (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a

> school board may be under a constitutional duty to do so even in the absence of a court order.

473 F. Supp. at 1012, J.S. at A-27.

As to the first ground, the District Court relied primarily upon *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Nyquist v. Lee*, 402 U.S. 935 (1971), *aff'g mem.* 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court). The only difference from those cases was purely superficial. There, the laws expressly prohibited or burdened efforts to remedy or protect against discrimination; Initiative 350 prohibited for all purposes the use of a technique necessary to remedy segregation, but then created exceptions for every significant purpose other than desegregation. "This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes." 473 F. Supp. at 1013, J.S. at A-30.

Under its second rationale, the District Court found that it could not precisely ascertain the subjective intent of each person who voted in support of Initiative 350, and that a judgment could not be based upon what might be " 'safely assume[d]' as to the subjective intent of the voters." *Id.* at 1014, J.S. at A-31. Consequently, the court relied primarily upon circumstantial indicia of purpose. The court found that Initiative 350 would result in a substantial increase in public school segregation, that such an increase would damage the education of minority children, and that this impact was both a "certainty" and a contemplated result of the initiative. *Id.* at 1015, J.S. at A-33 to A-34. Moreover, the background and context of the initiative made it clear that one significant purpose of Initiative 350 was terminating effective desegregation. The initiative forbids "every major effective technique" of desegregation. Further, it was a "marked departure from the . . . norm" for "an administrative decision of a subordinate local unit of government" to be "overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by" the decision. *Id.* at 1016, J.S. at A-35. That departure was even more telling in light of the

traditional local autonomy of school boards with respect to the assignment of students. *Id.*

Third, the District Court held that Initiative 350 improperly applies on its face to a school district under an affirmative constitutional duty to desegregate, leaving as its only recourse "litigation in order to have a court declare the course of action that it should take." *Id.* at 1016, J.S. at A-36.

The school district plaintiffs incurred substantial attorney's fees and costs in the litigation—funds which would otherwise have been available for educational purposes. Nonetheless, the District Court refused to award attorney's fees to the school district plaintiffs on the grounds that the public had already paid the fees. J.S. at C-2.

G. The Court of Appeals' Decision

Despite successful implementation of the Seattle Plan, the State sought review in the Court of Appeals for the Ninth Circuit. The State did not specifically dispute any of the underlying facts found by the District Court. With one judge dissenting, the Court of Appeals affirmed the conclusion that Initiative 350 is unconstitutional, but reversed the District Court's denial of the school district plaintiffs' motion for attorney's fees.

As to the constitutional issues, the Court of Appeals found it necessary to discuss only the District Court's conclusion that Initiative 350 embodies an invidious racial classification, agreeing with the District Court that Initiative 350 was materially indistinguishable from the statute overturned by this Court in *Lee*. 633 F.2d at 1342-43, J.S. at B-4 to B-5.

In short, "Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason." *Id.* at 1343-44, J.S. at B-5. If it

were to make a difference that the classification was covertly rather than overtly embodied in the initiative, "[l]awmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals." *Id.* at 1344 and n.4, J.S. at B-6 to B-7.

As to attorney's fees, the Court of Appeals held that nothing in the plain language or legislative history of the relevant statutes foreclosed or limited awards to publicly funded plaintiffs. *Id.* at 1348, J.S. at B-14 to B-15. On the contrary, such awards would further the congressional purposes of encouraging vindication of constitutional rights and stimulating voluntary compliance with the law. *Id.*

The Court of Appeals denied rehearing and rehearing *en banc*, J.S. at E-1, and this Court subsequently noted probable jurisdiction.

Now in its fourth year, the Seattle Plan has not only successfully desegregated the public schools, but has done so with significant community support and without violence or racial tension.[15] As the Court of Appeals noted, "the 'Seattle Plan' in particular has been hailed as a model for other large cities." 633 F.2d at 1341, J.S. at B-1.

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[15] The Seattle Plan achieved its goal of elimination of racial imbalance in 1979 and has maintained desegregated schools since. Desegregated education has become institutionalized in Seattle. After extensive citizen involvement, the School Board in February 1981 adopted a three-year plan to maintain stable desegregated schools, again citing its "legal and educational duty." For a current account of desegregation in Seattle, see *Proposed Bills on Court Ordered School Busing—Hearings on S. 528, S. 1147, S. 1647, & S. 1743 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (October 16, 1981, statement of Suzanne Hittman, Seattle School Board President). For an historical account of development of the Seattle Plan, see A. Sieveland, *Without a Court Order—The Desegregation of Seattle's Schools* (1981).

SUMMARY OF ARGUMENT

The District Court correctly recognized three ways in which Initiative 350 violates the Fourteenth Amendment.[16] If this Court finds support for any one of the bases of unconstitutionality, as did the Court of Appeals, the judgment must be affirmed.

First, Initiative 350 directly embodies an invidious racial classification admittedly unsupported by any compelling state interest. Designed to treat student assignments for desegregation differently from all other student assignment matters, it operates to maintain and increase segregation, to inhibit equal educational opportunity, and to deny

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(cont.)

Contrary to the "conventional wisdom" that mandatory busing for desegregation causes substantial "white flight" and is therefore counterproductive, white student attrition in Seattle has been roughly the same in the four years of the Seattle Plan's operation as it was in the three years preceding the Plan. The white loss from predominantly minority and transition areas, which is "certain" with a neighborhood assignment policy, has been reduced. *See* 473 F. Supp. at 1010-11, J.S. at A-25 (FF 11.3). Test scores in Seattle have slightly improved; significant improvements are expected in the longer term, consistent with the national research. Moreover, even apart from test scores, a diverse student body better prepares students for life in a pluralistic society. Thus, the experience in Seattle is consistent with that nationwide, as shown by the State's own Ex. A-133, Tr. 1346 (Harris Poll) at pp. ix, x, and 40:

> While there are whites who are still emotionally disturbed at the notion of busing for racial balance, the almost automatic claim that "busing is a disaster" simply does not hold up in the face of the facts from this study. . . . The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea, which appears not to work badly at all when put into practice. . . . Among whites whose children have been bused for desegregation, 78% say the experience is satisfactory or highly satisfactory.

[16] Whether Initiative 350 violates the State Constitution was expressly left unaddressed by the District Court, 473 F. Supp. at 1016, J.S. at A-36. If the District Court and Court of Appeals were incorrect as to federal law, the case should be remanded for application of state law and, if necessary, for Phase II of the litigation. *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 (1977).

minority interests. School operations in Washington have traditionally been local matters, and only after adoption of the Seattle Plan for desegregation did the voters of the State as a whole feel the necessity to dictate student assignment policy in one narrow area to three local districts. In so doing, Initiative 350 restructures the political process in a non-neutral manner by foreclosing to minorities the traditional mechanism of influencing one's local school board as a means of attaining educational goals.

Second, the District Court's finding that Initiative 350 purposefully discriminates against racial minorities is compelled by the evidence. Prior to the election, it was well known to the electorate that the initiative would end the Seattle Plan and dramatically increase school segregation, and that voluntary desegregation efforts had failed and would fail again. The context and purpose of Initiative 350 was opposition to the Seattle Plan and effective school desegregation. Discriminatory purpose was also reflected in the procedural departure from the norm represented by the first use of the statewide initiative process to deal with a traditionally local school district matter in one area, racial desegregation, and—by careful design—only in that area. Further, the absence of a close relationship between the antibusing initiative and any permissible purpose, as well as evidence of subjective intent, both reflected discriminatory purpose.

Third, Initiative 350 unconstitutionally interferes with the affirmative duty of school districts to remedy past unlawful segregation. It prohibits local school districts from assigning students beyond their neighborhood schools, except pursuant to court order, without regard to whether those local school districts have or perceive a constitutional duty to desegregate. Because the statute on its face is susceptible of application to constitutionally *required* conduct, it is invalid.

Finally, the Court of Appeals correctly held that the successful school district plaintiffs are entitled to their costs

and attorney's fees. Federal law requires such an award unless special circumstances render it unjust. No such circumstances exist here. Indeed, a denial of costs and fees would mean that school board members must choose between surrendering the constitutional rights of their students, which they are sworn to uphold, or irreparably diverting necessary funds from education.

ARGUMENT

A. Initiative 350 Embodies a Racial Classification Disadvantaging Minorities

The Court of Appeals and the District Court properly relied upon *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Nyquist v. Lee*, 402 U.S. 935 (1971), *aff'g mem.* 318 F. Supp. 710 (W.D.N.Y. 1970), in concluding that Initiative 350 reflects an invidious racial classification unjustified by any compelling state interest.

1. Hunter *and* Lee

In *Hunter* this Court held that § 137 of the Akron City Charter violated the Fourteenth Amendment. The charter provision, which was added by a referendum, prevented the city council from implementing, without the approval of a majority of voters, any ordinance dealing with racial, religious, or ancestral discrimination in housing. The provision thus created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389. The Court pierced the superficial neutrality of the provision: "although the law on its face treats Negro and white, Jew and Gentile in an identical manner, the reality is that the law's impact falls on the minority." *Id.* at 391. Applying the "suspect classification" test to the provision, the Court found that none of Akron's justifications amounted to a compelling state interest.

Justice Harlan's concurrence focused on § 137's restructuring of the political process in a racially

discriminatory manner: "Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395. Such a provision is "discriminatory on its face," and must fall "unless it can be supported by state interests of the most weighty and substantial kind." *Id.* at 393.

In *Lee* a three-judge court held *Hunter* dispositive as to a New York statute prohibiting student assignments and certain other actions "for the purpose of achieving racial equality in attendance." 318 F. Supp. at 712. Like Initiative 350, the New York antibusing statute had the effect of differentiating between racial matters and other problems in the same area. *Hunter*, according to the court in *Lee*, stands for the principle that "the state creates an 'explicit racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id* at 718. Because the lower court's sole stated rationale and any possible alternative theories in *Lee* apply equally to Initiative 350, this Court's summary affirmance is controlling here. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).[17]

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[17] The United States contends that *Lee* may be explained on two grounds that make it inapplicable here. First, it is said that the statute in *Lee* "clearly prohibited 'all efforts to achieve racial balance' (318 F. Supp. at 715)...." Brief at 25. Second, the statute in *Lee* prohibited race-conscious assignments "pursuant to a court finding of unconstitutional segregation," and thus this Court's affirmance was governed by the decision two weeks earlier in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971). Brief at 25-26 & n.27. Neither distinction is satisfactory.

The statute in *Lee*, like Initiative 350, dealt only with desegregative student assignments and related techniques. 318 F. Supp. at 712. If anything, the prohibitions of Initiative 350 are broader in that § 3 prohibits desegregative school pairing, merging, or clustering; desegregative grade restructuring; and desegregative feeder schools. Neither the New York statute nor Initiative 350 prohibited voluntary desegregation efforts. *See* N.Y. Educ. Law 3201(1) (McKinney 1970). Thus, the *Lee* court's comment that the statute "clearly applies to all efforts to achieve racial balance" must have reflected only the court's earlier conclusion that voluntary plans

2. *Initiative 350's Race-Consciousness*

As the Court of Appeals and the District Court recognized, Initiative 350 is like the charter provision in *Hunter* and the statute in *Lee*. It is race-conscious in its history and race-related in its purpose and effect. The initiative draws a distinction between those groups who seek the law's protection against racial discrimination in student assignments and those who seek to regulate student assignments in the pursuit of other ends. *Compare Hunter*, 393 U.S. at 390.

Initiative 350's drafting and campaign history plainly demonstrates the intention to limit student assignments for desegregation, but not to limit any other assignments, as is suggested by the very name of the proponents—Citizens for Voluntary Integration Committee. In the course of drafting, the exceptions to the "nearest or next-nearest" rule and the desegregation tools specifically prohibited were both expanded. Although more artfully crafted than the statute in *Lee*, the initiative was offered to, and accepted by, the electorate as the most recent step in opposition to "forced busing," *i.e.*, effective desegregation. *Compare* 318 F. Supp. at 716-17.

The law's purpose and effect plainly fall on the minority, by dismantling local school desegregation programs, preventing future adoption of such programs, injuring educational achievement of minority students, and requiring

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(cont.)

"have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." 318 F. Supp. at 715. That is precisely the situation in this case, and the Justice Department's attempted distinction merely reemphasizes the applicability of *Lee*.

The same is true with respect to the second "distinction." There was no "court finding of unconstitutional segregation" in *Lee*. The statute was struck down in its entirety, not just as applied to districts under court orders to desegregate. Indeed, the district court in *Lee* specifically upheld the personal standing of parents of children in schools suffering only from "*de facto* segregation," which there is "no constitutional duty to undo." *Id.* at 713-14. Thus, if *Lee* was directly controlled by the *Swann* cases, it was by *McDaniel v. Barresi*, 402 U.S. 39 (1971), discussed *infra* at 41-42, which upset state court interference with race-conscious student assignments by a local district *not* acting under a "court finding of unconstitutional segregation."

expensive and time-consuming litigation for the vindication of constitutional rights. In *Hunter*, this Court noted that only minorities need the protection of a fair housing law to halt segregative housing choices by whites. 393 U.S. at 391. Here, as in *Lee*, only minorities need the protection of a desegregation plan to halt segregative school choices by whites.

As in *Hunter*, the initiative specially burdens, indeed forecloses, the attainment of important minority educational and social goals through the local political process. In *Hunter* local voters could still enact fair housing ordinances, but Initiative 350 flatly prohibits local non-neighborhood assignments for desegregation, absent a court order. The requirement that any amendments to Initiative 350 be adopted at the state, rather than the local, level effectively removes from Seattle's minority community any realistic hope of amendment. *See* note 28 *infra*.

The State asserts that there is no unique burden on minorities for three reasons: First, the Seattle Plan reassigns some members of all races, and terminating the Plan necessarily affects them all. Second, many minority parents dislike non-neighborhood assignments. Brief of Appellants at 19-20. Third, the initiative might have some application to assignments unrelated to desegregation. *Id.* at 10.

The first reason is merely the suggestion—repeatedly rejected by this Court—that separate schools, separate seating, antimiscegenation statutes, repeal of antidiscrimination laws, and the like affect both blacks and whites.[18] The correct approach is shown by *Goss v. Board of Education*, 373 U.S. 683 (1963), where the Court

[18] *E.g., Loving v. Virginia*, 388 U.S. 1, 8 (1967) ("The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination . . . ."); *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) ("all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty"); *Anderson v. Martin*, 375 U.S. 399, 403 (1964) (fact that candidates of all races must designate race on ballot does not remove requirement's "purely racial character and purpose"). The State is apparently unaware that *McLaughlin* overruled *Pace v. Alabama*, 106 U.S. 583 (1883).

unanimously held that "[t]he alleged equality—which we view as only superficial—of enabling each race to transfer from a desegregated to a segregated school does not" remove the action's "purely racial character and purpose." *Id.* at 688.

The second reason is simply irrelevant. Everyone, including the Seattle School Board, would prefer to accomplish school desegregation in some other manner. Yet, the record in this case establishes that mandatory non-neighborhood assignments were essential to effective desegregation, and that minority parents had invoked the local political process and accepted some inconveniences to obtain desegregated education. Even if minority leaders had opposed the Seattle Plan, that would not justify a denial of the interests of other minority children. *See Castaneda v. Partida*, 430 U.S. 482 (1977); *id.* at 503 and n.2 (Marshall, J., concurring).

Third, in the hope of escaping the conclusion that the initiative is a racial classification, the State strains to apply it to nonracial student assignments. These situations, which either do not occur in the real world or else fall within the broad exceptions to the initiative,[19] are nothing more than after-the-fact speculation as to possible, unintended side

[19] For instance, there is no evidence in the record that school districts assign students to other than their nearest or next-nearest school to "balance class size." The Spokane newspaper article (Ex. A-130) cited by the State, Brief at 10 n.6, was successfully objected to as hearsay, and was admitted only for the limited purpose of showing what was before some voters prior to the Initiative 350 vote. Tr. 937. The witness through whom the State wished to make its point testified that the only non-neighborhood busing in Spokane is due to "overcrowding," Tr. 934, which of course is among the initiative's exceptions.

The suggestion that districts would transport students away from neighborhood schools simply to secure transportation reimbursement from the State is likewise unfounded. In recent years the State has reimbursed a substantial portion of, but far from all, local transportation expenses. Because local districts must contribute their own resources to any transportation, it is always a losing proposition financially.

effects of a measure designed to affect only racial matters. Initiative 350 must be construed as repeatedly interpreted by its sponsors.[20] CiVIC consistently denied that the initiative would affect anything but desegregation busing. The State's argument, that a statute which clearly and admittedly was *intended* to deal with race relations can be saved by additional but unanticipated *impacts*, stands *Washington v. Davis*, 426 U.S. 229 (1976), on its head.[21]

3. *Overt v. Covert Classifications*

The only difference between the statute here and that in *Lee* is one of form and not substance. Initiative 350 was more carefully drafted—and purposefully so. Thus, unless clever language excuses the same objective as in *Lee* and *Hunter*, Initiative 350 must be subjected to strict scrutiny.

That *Hunter* and *Lee* apply to artful as well as obvious racial classifications is clear from *Buchanan v. Evans*, 423 U.S. 963, *aff'g mem.* 393 F. Supp. 428 (D. Del. 1975). In that case, a statute directed officials to consider consolidating the state's school districts, with two exceptions, into a smaller number of districts. The district court found the two exceptions—Wilmington and districts with over 12,000 pupils—were intended to preclude desegregative consolidations of other districts with the largely minority Wilmington district. Although consolidating Wilmington with other districts could still be accomplished by referendum, although one other district was inadvertently excluded by the 12,000-student provision, although there was

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[20] The basic rules of construction applicable to enactments of the legislature also apply to direct legislation by the people. *State ex rel. Public Disclosure Commission v. Rains*, 87 Wash. 2d 626, 633, 555 P.2d 1368, 1373 (1976). Determining the collective intent of the people is the objective, and material in the official voters' pamphlet is relevant. *Department of Revenue v. Hoppe*, 82 Wash. 2d 549, 552, 512 P.2d 1094, 1096 (1973).

[21] Nor is the argument supported by *James v. Valtierra*, 402 U.S. 137 (1971). The referendum at issue in *James* applied not to integrated housing but to low-income housing, and the Court found no evidence that it was in fact an inadvertently broad statute aimed only at race relations in housing. *Id.* at 141. Here the critical fact of race-consciousness is openly admitted.

no finding of an interdistrict constitutional violation, and although the statute was "racially neutral on its face," the district court found that the statute reflected "a suspect racial classification." 393 F. Supp. at 442. This Court affirmed summarily, with three Justices dissenting on other grounds.

Concern with transparently race-conscious statutes did not end with *Evans*:

> This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356; *Guinn v. United States*, 238 U.S. 347; *cf. Lane v. Wilson*, 307 U.S. 268; *Gomillion v. Lightfoot*, 364 U.S. 339.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979). Such a racial classification is presumptively invalid, regardless of any other proof of motivation and regardless whether the classification is "covert or overt." *Id.* at 274. *Feeney* is thus consistent with the Court's duty to strike down "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).[22]

The courts below correctly concluded that Initiative 350 creates a racial classification. It is not the rare classification, such as those in *Korematsu v. United States*, 323 U.S. 214 (1944), or *Strauder v. West Virginia*, 100 U.S. 303 (1880), that expressly burdens only a racial minority. Nor is it a classification, such as those in *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Hunter*, that mentions race, and race relations, but does not expressly burden one race more than another.

[22] The "covert or overt" language in *Feeney* is also consistent with the jury discrimination cases. In those cases, no classification is explicit on the face of the law. Substantial underrepresentation in practice, however, is sufficient to shift the burden to the state to rebut the suggestion of discriminatory purpose. *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *accord, Washington v. Davis*, 426 U.S. at 241. This case is an even clearer one for shifting the burden since it is admitted that the law in fact deals with racial matters.

Instead, it is a classification, such as those in *Gomillion*, *Yick Wo*, and *Guinn*,[23] all mentioned approvingly in *Feeney*, that only transparently avoids the express mention of race and race relations, but that undeniably deals with both.

4. ***Necessity of Further Proof of Purpose***

Finally, the State asserts that its appeal rests on the proposition that after *Washington v. Davis* "courts are no longer free to *presume* from the face of a given statute—as was done in *Hunter* and *Lee*—that an illicit segregative purpose motivated its passage." Brief of Appellants at 23 (emphasis in original). The assertion that *Davis* overturned *Hunter* and *Lee* is simply wrong. Race-conscious statutes—such as those in *Hunter*, *Lee*, and this case—by their very concern with racial matters create a risk that bias infected the majority's consideration of minority interests, at least where they do not benefit the minority. *Compare Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Brennan, White, Marshall, & Blackmun, J.J.).[24] Only the absence of any alternative means of satisfying a compelling state interest is normally sufficient to dispel that suspicion of antipathy.

Accordingly, *Hunter* was cited approvingly in *Davis*, which went on to state "[t]hat is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute . . . ." 426 U.S. at 241. The Court has since made it clear that, because the statutes in *Hunter* and the present case burden minorities and involve concern with racial matters, they are not the kind of neutral laws with

[23] In *Guinn v. United States*, for example, the Court struck down an Oklahoma constitutional amendment that imposed a literacy test for voting but grandfathered all those who had voted in 1866 and their lineal descendants. Because the 1866 election was the last major election before adoption of the Fifteenth Amendment, the Oklahoma scheme covertly reflected a racial classification. 238 U.S. at 364. Initiative 350 is equally clever, but equally obvious.

[24] Contrary to the *Bakke* situation, where the governmental benefit to the minority is at the expense of the majority, elementary and secondary school desegregation deprives no one of the benefit of an education.

inadvertent impact authorized by *Davis*. As the Court stated in *Feeney*: "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." 442 U.S. at 272.

If *Davis*, which involved no express or implicit race-consciousness and no allegation by plaintiffs of discriminatory purpose, and *Arlington Heights*, which involved no express race-consciousness and insufficient proof of implicit consideration of race, overturn *Hunter* and *Lee*, then this Court and others must seek out direct evidence of racial prejudice in every case. It has always been enough to invoke strict scrutiny that the majority was dealing, overtly or covertly, with matters that present an inherent risk of antipathy toward minority interests. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). That risk is sufficient to shift to the State the burden of dispelling the inference of prejudice, usually by establishing "an extraordinary justification" for the action. *See Loving v. Virginia*, 388 U.S. 1, 9-11 (1967); J. Ely, *Democracy and Distrust* 145-48 (1980). Any other rule would place the courts in the unnecessary and unwise position of protecting minority interests *only* by directly accusing other branches of government of racial prejudice.

5. ***Conclusion***

The Court cannot fail to recognize the potential for the corruptive influence of prejudice in a decision whether to allow desegregation. No other proof of invidious purpose is necessary. Instead, the burden should shift to the State to show, for example, that the State interest was sufficiently compelling, and the sacrifice of desegregation sufficiently necessary, to outweigh the potential for corruption. That is a burden the State never even attempted to satisfy. Instead, the initiative contradicts the "compelling" state interest in public school desegregation. *DeFunis v. Odegaard*, 82 Wash.

2d 11, 35, 507 P.2d 1169, 1184 (1973), *vacated as moot*, 416 U.S. 312 (1974).[25]

B. Discriminatory Purpose Was a Factor In Initiative 350's Adoption

Even if the covert but conceded race-consciousness of Initiative 350 were not enough to invoke strict scrutiny, the District Court correctly concluded, under the second prong of *Feeney*, that a discriminatory purpose was at least one factor in the proposal and adoption of the initiative.

In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court reviewed some of the important indices of whether a governmental action is impermissibly infused with purposeful discrimination:

> (a) "The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis, supra*, 426 U.S. at 242—may provide an important starting point."
> (b) "The historical background of the decision," including the "specific sequence of events leading to the challenged decision" and procedural and substantive departures from the norm in connection with the decision, is important circumstantial evidence.
> (c) Finally, the "legislative or administrative history" of the decision may provide direct evidence of purpose and of subjective intent.

Id. at 266-68. Substantial evidence, ignored by the State, supports the District Court's conclusion that Initiative 350 is purposefully segregative under *Arlington Heights*.

1. *Segregative Impact*

The dramatic increase in minority racial isolation that Initiative 350 would have caused was fully foreseen, not just

[25] Initiative 350 makes impossible attainment of public schools' legitimate educational goal of racially diverse student bodies. The institutional interest in diverse student bodies is not only legitimate but is one aspect of academic freedom protected by the First Amendment. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.).

easily foreseeable. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65 (1979). Both lower courts concluded that Initiative 350 was directed only at racial desegregation. 473 F. Supp. at 1010, J.S. at A-24 (FF 8.3); 633 F.2d at 1343-44, J.S. at B-5 to B-6. Both courts found it would be impossible to desegregate Seattle's schools without resort to the methods prohibited by the initiative. 473 F. Supp. at 1010, J.S. at A-24 (FF 8.5); 633 F.2d at 1346, J.S. at B-11. Moreover, the inconvenience of desegregation would no longer have been shared equitably. Rather, the limited desegregation obtainable under Initiative 350 would result largely from efforts of minority students. 473 F. Supp. at 1006-07, J.S. at A-16 to A-18 (FF 6.6, 6.7, and 6.16).

Further, the District Court below concluded that the racial isolation under Initiative 350 would disproportionately injure the education of minority students. *Id.* at 1001, 1011, and 1015, J.S. at A-7, A-25, and A-33 (FF 3.1, 3.1(a)); *see* 633 F.2d at 1346-47, J.S. at B-9 to B-13.[26] That same finding as to both purposeful *and* non-purposeful segregation by the district court in *Brown v. Board of Education* was adopted by this Court: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law. . . ." 347 U.S. 483, 494 (1954) (emphasis added); *accord,*

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[26] The United States now closes its eyes to Initiative 350's effect on the educational benefits to minority students from desegregation, in spite of the District Court's findings. Contrary to the current position of the United States, the District Court did not merely "assume" a detrimental impact on minority student education, but found such an impact as a fact after both sides had presented their evidence. Congress has itself reached the same conclusion. Conf. Rep. No. 798, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2608, 2662-63. The United States cannot wave aside such fact-finding merely by referencing certain extra-record publications, Brief at 38-39 n.39, especially when the publications do not stand for the proposition cited.

Sweatt v. Painter, 339 U.S. 629, 634 (1950).[27] Further, the critical importance of the minority interest in question emphasizes the significance of the evidence of anticipated impact. *Cf. Vlandis v. Kline*, 412 U.S. 441, 459 (1973) (White, J., with Marshall, J., concurring).

2. ***History and Context of the Initiative's Adoption***

The historical background of Initiative 350, the sequence of events leading to its enactment, and the legislative and administrative history of the initiative all make clear that impeding effective desegregation was a purpose, and not just an unfortunate and unintended effect, of the measure. The initiative was conceived solely in response to Seattle's desegregation program, as appellants have conceded and both courts below found. A comparison of the major features of the Seattle Plan with those actions that school officials may not take under § 3 of the initiative quickly confirms the initiative's invidious purpose; a racially neutral neighborhood schools policy is unlikely to be expressed in such desegregation-specific language.

Nonetheless, the State suggests that the courts below believed that a policy of neighborhood schools is per se purposeful discrimination. That innuendo is unfounded. The Court of Appeals specifically stated that a "neighborhood school policy is not constitutionally suspect." 633 F.2d at 1345, J.S. at B-8. In this case, however, both the objective factors and the direct evidence indicate that at least one purpose of statewide opposition to "forced busing" was the racially discriminatory purpose to impede school desegregation.

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[27] The State's attempt to narrow the legitimate educational concerns of school districts to the results of achievement tests, Brief at 41-42 n.9, lacks support. Preparing children to participate as citizens in a pluralistic democracy entails more than teaching them to read and count. *E.g., Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (schools serve in our society as "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground"); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 517-18, 585 P.2d 71, 94-95 (1978).

This situation is identical to that hypothesized in *Arlington Heights* as reflecting improper purpose. The Court distinguished the specific sequence of events there—a longstanding low-density zoning designation—from "a far different case," in which the property has previously been zoned to accommodate low-income, multifamily housing, but where the zoning is upgraded to preclude erection of an integrated housing project. 429 U.S. at 267. Such a situation, without any other direct evidence of racial bias, creates a prima facie suspicion of purpose. Here, the longstanding condition was local control of assignments, and not on a strict neighborhood basis, until effective desegregation was proposed.

Further, use of the statewide initiative process by uninvolved voters to deal with a local school district matter was an unprecedented departure from the norm.[28] No prior enacted initiative has dealt with such local school district matters. The argument of the State, Brief at 22, that Initiative 350 merely corrected the one oversight in an

[28] Statewide action prohibiting local decisions benefiting minority groups is particularly troubling because minorities with substantial power in the urban districts are relatively politically powerless in the State as a whole. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 628 (1969); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978).

That is reflected in the fact that a significantly smaller percentage voted for the initiative in Seattle (less than 58%) than in the remainder of the State (over 67%). Def. Ex. A-105, p. 7, Tr. 774.

In elections for two board seats in November 1979, when virtually the only issue which received media attention was desegregation, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates. In one of the races, the incumbent (who had voted to adopt the Seattle Plan) defeated the president of CiVIC. In the November 1981 elections, three of the seven board seats were open. Again, desegregation was an issue, but in each case outspoken opponents of mandatory desegregation were defeated. That efforts to elect antidesegregation candidates and to recall pro-desegregation board members, *see State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972), have been unsuccessful also reflects the ability of minorities to build political coalitions in Seattle.

otherwise perfect scheme of total state control, was not presented to the courts below prior to the Court of Appeals' decision, *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980), and is unsupportable in any event.

In Washington, as in other states, local boards are created by the State and operate within certain broad limitations. In Washington, as in few other states, however, the State is required to fund "basic education," and therefore had to give content to that term. *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). In practice, nonetheless, local boards still control the operational specifics of "basic education" and independently fund and define "enrichment" programs.[29] The State in some areas sets *minimum* standards, but even those standards generally defer to local practices. That is not substantially different from the national pattern of local school district control, as CiVIC realized and the State Board of Education confirmed. J.A. 70 and 98.[30]

Moreover, in Washington, as in other states, student assignments have always been within the control of local authorities, and remained so after Initiative 350 for all common purposes other than desegregation. Prior to Initiative 350, local districts had the authority under state law to assign students for purposes of desegregation. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

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[29] Currently, only 55% of Seattle School District's funding comes from the State as "basic education" support.

[30] The District Court and the Court of Appeals so concluded, 473 F. Supp. at 1010 & 1016, J.S. at A-23 to A-24 & A-35 (FF 8.20 and opinion); 633 F.2d at 1343 n.2 & 1344, J.S. at B-4 to B-7, and are in a far better position to assess local law and local practice than is this Court. *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975). The similarities between the Washington education system and the national pattern are discussed in greater detail in the brief of *amicus* National School Boards Association.

3. *Lack of Relationship Between Means and Permissible Ends*

Although not discussed in *Arlington Heights*, improper purpose is also objectively reflected in the lack of a close relationship between Initiative 350 and any of its asserted noninvidious objectives. The antibusing initiative, say appellants, was intended to achieve "neighborhood schools," which are desirable because they encourage local involvement in education and reduce student transportation time, risk, and expense. The degree of relationship between those objectives and Initiative 350 is instructive.

First, increasing local control and involvement in schools and decreasing transportation time were far from ignored in the Seattle Plan. The Plan was locally formulated and approved, and it generally keeps neighborhoods together. Although there are bus rides, their length is reasonable, *see* note 6 *supra*, and children spend at least half their years at nearby schools. Thus, the intense statewide interest in Initiative 350 can not be explained by pointing to those noninvidious concerns.

Second, the initiative is not substantially better suited than the Seattle Plan to achieving the purposes said to underlie a neighborhood schools policy. Rather than furthering local involvement and control, Initiative 350 replaces it with a statewide mandate. Indeed, the State and the United States go to great lengths to disclaim local responsibility for schools in Washington.

Furthermore, Initiative 350 leaves untouched school closures—the most drastic removal of the neighborhood school possible—and all common exceptions to neighborhood school assignments other than desegregation. This dramatic underinclusiveness reflects a conclusion by the majority that the minority's interest in desegregated education is qualitatively less important than *any other* common, and basically fiscal, reason for transporting students. Neighborhood schools give way to the desire to save money by closing schools or by avoiding removal of "health or safety

hazards" or "physical barriers," building of new neighborhood schools to eliminate "overcrowding," maintenance or rehabilitation of neighborhood schools to avoid "unsafe conditions or lack of physical facilities," or provision of "special education, care or guidance" within the neighborhoods of handicapped students.

The majority did engage in a "tradeoff" of interests as the United States suggests, Brief at 43, but it was a tradeoff that sacrificed only the minority's interests and not the similarly situated interests of the majority. This Court has repeatedly held that the majority must impose the same burdens on its own interests as on those of the minority if the majority wishes to avoid the suspicion of improper purpose. *E.g., Orr v. Orr*, 440 U.S. 268, 280 n.10 (1979). As Justice Jackson indicated in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949), such a requirement has the prophylactic effect of assuring indirect consideration of minority interests.

Third, voluntary desegregation assignments under the initiative would equally undercut the neighborhood school purposes. The State protests the factual conclusion by the District Court and the Court of Appeals that Initiative 350 would make it "impossible" to desegregate the public schools. Yet, if sufficient voluntary desegregation were to occur under Initiative 350 (a hypothetical that flies in the face of experience and the evidence), just as many students would be bused out of their neighborhoods as in the absence of Initiative 350. Of course, those would be minority students, disproportionately forced to sacrifice the benefits of neighborhood schools to gain the benefits of desegregated schools.

Moreover, the cost and risk of transportation in a hypothetically effective voluntary program would be greater than under mandatory desegregation.[31] Student camaraderie

[31] Because riding a bus to school is statistically safer than walking, *see* U.S. Commission on Civil Rights, *Public Knowledge and Busing Opposition* 17 (1973), the safety justification for opposition to busing has little force.

and parental cohesiveness and involvement would be less than under mandatory desegregation, where groups of students and parents are kept together over the years, and where the composition of the student body is predictable from year to year. Consequently, Initiative 350 achieves a limited measure of the purposes of a neighborhood schools policy only if one assumes that there would be an appreciable decline in actual desegregation.

In sum, Initiative 350's weak or non-existent relationship to constitutionally acceptable goals must be seen to reflect not just the purpose of mandating that children go to neighborhood schools, but also the purpose of hindering effective desegregation efforts that equitably burden all races, as is confirmed by the evidence of subjective motivation.

4. ***Subjective Motivation***

The State's only real challenge to the District Court's sifting and weighing of the evidence of purpose is to suggest that the court "categorically refused even to consider the Defendants' evidence of benign intent on the part of the voting public . . . ." Brief of Appellants at 31. The State's insinuation is both irrelevant and misleading.

Because discriminatory purpose will seldom be nakedly declared, the trustworthiness of the denials of subjective intent submitted by the State is slight, as this Court has repeatedly indicated. *E.g., United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). *See generally* Ely, *Legislative And Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1218 (1970). As the Court stated in *Feeney*, "[p]roof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* . . . . What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the

results they avoid." 442 U.S. at 279 n.24.[32] That is especially the case where the decision-maker is not just a multi-membered body but an electorate numbering in the hundreds of thousands.

Nonetheless, although the District Court properly relied primarily upon "objective factors," it explicitly denied the school districts' motion in limine to exclude evidence of the subjective intent of the electorate. R. 429. Resultantly, the record is replete with such evidence.[33] The District Court made specific findings of fact relating to subjective motivation, *e.g.*, 473 F. Supp. at 1001, J.S. at A-8 (FF 3.7), and the court emphasized that its decision was rendered only "[a]fter considering all of the evidence . . . ." *Id.* at 1012, J.S. at A-27.

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[32] *See also Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (Harlan, J.) ("Judicial inquiry into Congressional motive is at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."); *Arlington Heights*, 429 U.S. at 270 n.20 (upholding exclusion of evidence of subjective motivation).

One reason evidence of subjective intent is untrustworthy is that prejudice is often, if not usually, subconscious. G. Allport, *The Nature of Prejudice* 11 (1954) ("Since they merely follow the folkways they deny that they are prejudiced"). Thus, stated intent might merely be a rationalization for subconscious unease about having one's child attend a desegregated school, as expert witnesses in this case testified. *See* note 33 *infra*. This Court has recognized that it makes no difference whether discrimination is "accomplished ingeniously or ingenuously . . . ." *Smith v. Texas*, 311 U.S. 128, 132 (1940). *See generally* Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7-8, & 14 (1976).

[33] Dr. David Armor, defendants' expert witness, testified that many white parents oppose minority children being bused into a white school. J.A. 104-05. Dr. James Morishima, an expert witness on surveys of racial attitudes, testified that racial bias is a factor in whites' opposition to busing. J.A. 104. Dr. Christine Rossell testified following her review of relevant data that many of the expressed nonracial reasons for opposition to desegregation busing are in fact conscious or subconscious rationalizations of racial fears. J.A. 91-93. A CiVIC attorney acknowledged the existence of racial discrimination as a factor in opposition to busing. J.A. 103-04. Even the CiVIC legislative co-chair testified that there are people in Seattle who are afraid of the other race and do not want their children to be in school with other races. J.A. 102. Sixteen percent of all whites openly favor separation of the races; 27% would be disturbed at having a black neighbor. Def. Ex. A-133, p. vi, Tr. 1346; J.A. 154-67.

5. *Conclusion*

The State contends that Initiative 350 must prevail unless evidence of subjective motivation established that it would not have been enacted "but for" segregative intent. Brief at 27. As this Court has held, however, the objective evidence of discriminatory purpose alone shifted the burden to the State to prove that the initiative would have been proposed and enacted even in the absence of a purpose to impede effective desegregation. *Arlington Heights*, 429 U.S. at 270-71 n.21. That burden is necessary because, where discriminatory purpose might well have motivated legislation, judicial deference is "no longer justified" and close scrutiny is essential. *Id.* at 265-66. In that case, which is this case, the presence of nondiscriminatory purposes among some supporters is irrelevant, unless such purposes constitute compelling state interests that could not be otherwise satisfied. Here they do not, and the courts below properly, albeit reluctantly, intercepted the possibility of majoritarian abuse.[34]

C. Initiative 350 Deters Satisfaction of the Affirmative Duty to Remedy Past Segregation

The District Court correctly recognized that Initiative 350 prohibits *all* non-neighborhood desegregation assignments, except pursuant to court order, regardless of whether a Washington school district has a constitutional duty to desegregate. Under Initiative 350, only a court may eliminate

(cont.)

The testimony of the State's expert, Don Morgan, that the results of certain polls "do not reflect a racial bias on the part of the respondents," was thoroughly refuted. The subject polls do not permit a conclusion one way or the other with respect to racial bias, as they were designed neither to ascertain the existence of such a factor nor to control for the fact that people seldom admit to racial bias, even where they are conscious of being biased. J.A. 154-67; *see* note 32 *supra*. Little if any credence was due the defense expert's conclusion after lengthy cross-examination and rebuttal testimony. *See* Tr. 856-918 & 943-72 (testimony of Don Morgan); Tr. 1288-1345 & 1435-42 (testimony of Dr. James Morishima, plaintiffs' expert); Tr. 1351-71 (testimony of Dr. Douglas L. MacLachlan, plaintiffs' expert); Pl. Ex. 128 (statement of Dr. Morishima).

[34] That a statute with certain similarities in language to Initiative 350 might be upheld in the absence of similar proof of segregative purpose and effect, as was the case with the federal statute upheld in *Brown v. Califano*, 627 F.2d 1221, 1230-31 & n.57 (D.C. Cir. 1980), is irrelevant to a decision in this case. *See also* note 35 *infra*.

the core, as well as the vestiges, of past purposeful segregation, thus vitiating the "affirmative" nature of the local districts' constitutional duty. Moreover, the initiative similarly impedes the federal statutory duty and goal to eliminate non-purposeful segregation.

1. ***The Affirmative Constitutional Duty***

It is by now well established that *local school districts* have an affirmative constitutional duty promptly "to eradicate the effects" of past unlawful segregation.[35] *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526, 537 (1979). "[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Id.* at 538. Thus, the district is under "the obligation not to take any action that would impede the process of disestablishing the dual system and its effects." *Id.* (relying upon *Wright v. Council of Emporia*, 407 U.S. 451 (1972), and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972)[36]). Specifically included within the affirmative duty is a responsibility "to see that pupil assignment policies" "are not used and do not serve to perpetuate or re-establish the dual school system." *Columbus Board of Education v. Penick*, 443 U.S. 449, 460 (1979).

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[35] The duty applies to local districts, not to federal agencies or courts. This analysis is therefore inapplicable to federal laws affecting only federal instrumentalities. *See* note 34 *supra*. Moreover, the facial overbreadth analysis, *infra* at 41-42, is doubly inapplicable to federal laws affecting federal courts, since federal courts could hardly be deterred by a facially overbroad law, and in fact have not been. *E.g., Morgan v. Kerrigan*, 530 F. 2d 401, 412-13 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). Thus, it is irrelevant that this analysis has not been applied to the various federal statutes discussed by appellants. Whether those statutes are or are not constitutional is neither directly nor effectively at issue here.

[36] *Scotland Neck* is instructive in that no court had found the district guilty of unlawful segregation. After the district agreed to desegregate, the state legislature passed a bill creating a new district. 407 U.S. at 486-87. This Court struck down the legislation as likely to "impede the dismantling" of the dual system. Thus, *Scotland Neck* stands directly for the proposition that, whatever a state's authority under state law, it may do nothing to interfere with a local district's determination and satisfaction of its own constitutional duty. *Dayton I*, 433 U.S. 406 (1977), is in no way inconsistent, because in *Dayton I* the district had reconsidered its own decision prior to implementation.

The imposition of this duty on local districts recognizes not just their responsibility but also the vital national tradition in local autonomy of school districts, *Milliken v. Bradley (I)*, 418 U.S. 717, 741-42 (1974), and the fact that local authorities are in the best position for "elucidating, assessing and solving these problems." *Brown v. Board of Education (II)*, 349 U.S. 294, 299 (1955).

2. ***Necessity of "Busing"***

The courts below agreed that Seattle could not effectively eliminate segregation with the techniques permitted under Initiative 350. 473 F. Supp. at 1001-02, 1007 and 1010, J.S. A-7, A-8 and A-23 to A-25 (FF 3.5, 3.6, 3.8, 6:14, 8.1, 8.5, 11.1, and 11.2); 633 F.2d at 1346 and n.9, J.S. at B-11.[37] This Court's experience has led it to the same conclusion: "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); *accord, Swann v. Charlotte-Mecklenburg Board*

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[37] "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

Contrary to the present suggestion of the United States, CiVIC's "open enrollment" plan would not have been "effective" in obtaining "fully integrated" schools. Brief at 6 & n.9; *see id.* at 25. This support for a "freedom of choice" plan runs contrary to the position the United States took earlier in this case and in over two decades of school desegregation litigation. *E.g.*, Memorandum for the United States as Amicus, *Green v. County School Board*, 391 U.S. 430 (1968). That earlier position was accepted by this Court in *Green*. *Id.* at 440-41.

The evidence at trial established beyond doubt the lower court's finding that desegregation in Seattle would be impossible under the initiative. *See, e.g.*, J.A. 75, 89-91, 106, 123-30, 150-51, 193-96, & 202-03; Tr. 1414-15 ("Any plan consistent with Initiative 350 . . . would create the most segregated student populations . . . that the Seattle Public Schools has ever known, both in the numbers of schools and in the percentage of minority racial imbalance.").

The State asserts that it controls student assignments and all other aspects of education in Washington. In light of that, it is informative that the State has failed to develop and adequately fund an effective voluntary desegregation program for state schools such as Seattle's. Instead, both the State and the United States have *reduced* funding for voluntary programs and the excess cost of voluntary program busing.

of Education, 402 U.S. 1, 28-29 (1971).[38] Consequently, this "state-imposed limitation on a school authority's [student assignment] discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system," and it must therefore fall. *North Carolina State Board*, 402 U.S. at 45.

Initiative 350 does provide that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to public schools." This "recitation of the obvious" Tr. 1171-72, simply recognizes the impossibility of prohibiting courts from ordering non-neighborhood assignment of students where necessary to remedy a constitutional violation; it is, in the drafter's words, "superfluous." Def. Ex. A-102, p.3. Yet, if past segregation must remain unremedied pending court action, then there is no affirmative duty on the part of the local school districts at all. If the affirmative nature of that duty means anything, it means that a *local district* may not, and must not, await a court order to desegregate.[39] It is precisely for that reason that the courts uniformly applaud efforts of local districts to desegregate without a contested court order. *E.g.*, *Armstrong v. Board of School Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980); *United States v. Board of Education*, 88 F.R.D. 679, 681-82 (N.D. Ill. 1980).

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[38] Despite widespread unhappiness with mandatory busing, and despite the Congressional directive to consider other alternatives first, 20 U.S.C. §§ 1713-14 (1976), no alternative or combination of alternatives has been found sufficiently effective to eliminate the need for a mandatory student assignment component in numerous plans approved by the lower federal courts. Indeed, even decisions involving only the question of liability, and not remedy, are usually viewed by the public, the press, and even the parties as "busing" decisions, because it is well recognized that mandatory student assignments are essential to effective desegregation. *E.g.*, *Dayton II*, *supra*; *Columbus*, *supra*.

[39] California's Proposition 1, the subject of *Crawford v. Board of Education*, No. 81-38, expressly authorizes local school boards to continue or commence integration plans, including student assignments and transportation, regardless whether required to satisfy a court order. Federal law expressly authorizes local districts voluntarily to adopt desegregation plans that include busing. 20 U.S.C. § 1716 (1976).

3. *The "Saving" Construction of Initiative 350*

Implicitly admitting the force of the above argument, the Washington Attorney General seems to posit a construction of Initiative 350 that would allow a school district to act in the absence of a court order if it *correctly* perceives that it is under a duty to act and if it has exhausted all means of desegregation short of non-neighborhood assignments. This admitted attempt to rewrite the initiative to avoid unconstitutionality fails for a number of reasons.

First, this executive amendment is contrary to the initiative's plain language and purpose. Initiative 350 prohibits all non-neighborhood assignments other than those falling within its exceptions. The exception in question applies only to a court's duty to enforce the Constitution, not a local school district's duty to do so, and the State can point to no legislative history supporting its interpretation.[40] The courts below rejected the State's construction, and were

[40] The State purports to find some support, but the testimony cited, Brief at 39 n.8, instead indicates that CiVIC planned to sue to enjoin any school district that did not immediately comply with the initiative—regardless of whether the district perceived a constitutional duty requiring non-neighborhood assignments. In particular, CiVIC planned to sue to enjoin the Seattle Plan, even though the State apparently believes that Seattle had recognized a legal duty to desegregate. Brief at 41. Any construction of the initiative that would preserve the Seattle Plan is hardly consistent with its undisputed purpose to do nothing if not end the Seattle Plan.

Within weeks of the Court of Appeals' decision, House Bill 711 was introduced in the Washington State Legislature to terminate state funding of mandatory desegregation transportation. The bill was similar to Initiative 350 in that the funding termination was indirect, accomplished by reimbursement for transportation to the nearest or next-nearest school, with several exceptions. The Legislature rejected an amendment that would have continued traditional state funding of student transportation where an affirmative constitutional duty to desegregate existed. The refusal of the Legislature to incorporate the Attorney General's interpretation of Initiative 350 into the subsequent statute drafted by the same attorneys litigating this case for the State speaks volumes about that interpretation.

The bill was enacted into law, Ch. 343, 1981 Wash. Laws, but was permanently enjoined in an action filed by most of the same plaintiffs as in the present case. *Seattle School District No. 1. v. Washington*, No. C81-276T (W.D. Wash. Dec. 18, 1981) (findings, conclusions, and opinion). The rejected amendment was one reason for the district court's ruling that the funding version of Initiative 350 was also unconstitutional. *Id.* at 5-6.

in a better position than this Court to determine its validity under state law principles. *See* note 30 *supra*.

Although legislation must be construed where possible to accord with the Constitution, "this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose." *Howard v. Illinois Central R.R.*, 207 U.S. 463, 501 (1908). Accordingly, in *Lee* and *North Carolina State Board* this Court affirmed the district courts' refusal to accept similar "saving" constructions "too tortuous to warrant serious consideration." *Lee*, 318 F. Supp. at 715-16; *accord, North Carolina State Board*, 312 F. Supp. 503, 507 (W.D.N.C. 1970).

Additionally, the intimation that the Washington Attorney General has construed the statute so as to recognize the affirmative constitutional duty is inaccurate. The Attorney General refused to provide an opinion construing the statute, preferring instead to await the outcome of this litigation before determining how broad a formal opinion to give. Def. Ex. A-89, Tr. 589. There is no objective and authoritative opinion of the Attorney General—only litigative posturing.

Even if the purported construction had come through a formal opinion by the Attorney General, state courts would accord it only as much deference as its logic demands.[41] Thus, the State's present interpretation of Initiative 350 could be upset by any interested party, including the State itself.[42]

[41] *E.g., Kasper v. Edmonds*, 69 Wash. 2d 799, 805, 420 P.2d 346, 350 (1966) (Attorney General's opinion will be ignored where contrary to "reason, legislative history, or other rules of statutory construction").

The United States cites *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962), as somehow standing for the proposition that "[a]bsent a state court interpretation, the Washington Attorney General's interpretation clearly prevails over that of the district court." Brief at 26 n.28. But in *Lynch* this Court rejected the Government's statutory interpretation that was "buttressed" by an analogous local court decision.

[42] *Cf. Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693-95 (1979). The United States was not nearly so sanguine about the Washington Attorney General's representations in the *Salmon Case*. *See* Brief for the United States at 78, *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra*.

Although school board members would be protected from personal liability *if* they had formal advice of the Attorney General as to the meaning of Initiative 350 *and if* they were correct as to the need for desegregation, that would not validate their actions if a court should interpret Initiative 350 or the need for desegregation differently. *State ex rel. Day v. Martin*, 64 Wash. 2d 511, 392 P.2d 435 (1964). A state court injunction ending desegregation assignments in mid-year would wreak havoc on the districts and the educational program. The mere threat of such injury and disruption would deter a district from acting.

Nor would the Attorney General's representation free board members from personal concern with violating the plain language of a state statute. As the Court of Appeals noted, enforcement of Initiative 350 is not entrusted only to the Attorney General or to private persons; it is a civil statute imposing its own "affirmative duty to comply." 633 F.2d at 1342 n.1, J.S. at B-4.

Most important, even under the State's expedient construction, a local school board would be protected only if it could prove to a court that it had previously engaged in purposeful segregation with a current significant effect. Only on this question, racial desegregation of the schools, must a local board justify its actions relating to student assignment in court by a preponderance of the evidence. Thus, appellants' "saving" construction is subject to the same suspect classification as the law they now attempt to rewrite. Further, the State contends that the reviewing court would be engaged in the "difficult proposition" of applying "elusive concepts" in determining whether unlawful segregation exists. Brief of Appellants at 41. Thus, even a school board willing to confess its past guilt, in spite of the open-ended ramifications of such a confession, could not be sure of being upheld in court.

4. *Initiative 350 Is Facially Overbroad*

Regardless of the Attorney General's desire to rewrite the plain language, the statute *on its face* prohibits conduct not just protected but required by the Constitution—*i.e.*, satisfaction of the affirmative duty to desegregate by a local school district absent court order. *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964) (declaring statute unconstitutional on its face despite narrowing construction suggested by Washington Attorney General); *see Gooding v. Wilson*, 405 U.S. 518, 524 (1972). There should be no less concern with the effect of a facially overbroad law on satisfaction of the constitutional *duty* to desegregate than on exercise of the constitutional *right* to free speech. For that very reason, the present school districts have standing to assert the effect of the initiative both on themselves and on other districts that might have followed their example in desegregating through all necessary means but who might be deterred by Initiative 350 from doing so. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

In *North Carolina State Board*, this Court unanimously declared the relevant provision of an antibusing statute to be unconstitutional on its face—not just in its application to particular districts undergoing court-ordered desegregation. *See* 312 F. Supp. at 510. The Court found that the statute's "apparently neutral form" would deprive "school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." 402 U.S. at 45-46. Because "all reasonable methods" must be available, and because "it is unlikely that a truly effective remedy could be devised without continued reliance" on bus transportation, the antibusing statute "must inevitably conflict with the duty of school authorities to disestablish dual school systems." *Id.* at 46. The Court so held even though not all the state's schools were under court order and the district court had found that busing would not invariably be necessary to an effective remedy. 312 F. Supp. at 510.

The scope of the order upheld in *North Carolina State Board* indicates that the decision was not limited to school districts that had been judicially declared guilty of unconstitutional segregation which could be remedied only with non-neighborhood assignments. That understanding is confirmed by *McDaniel v. Barresi*, 402 U.S. 39 (1971), also decided unanimously the same day. In *McDaniel*, a state court had enjoined race-conscious student assignments in a non-court-ordered desegregation plan. This Court overturned that decision on the ground that satisfaction of the affirmative duty to disestablish unlawful segregation "will almost invariably require that students be assigned 'differently because of their race.' " *Id.* at 41.

5. *Initiative 350 is Preempted by Federal Legislation*

Even if the State is correct that there is no possibility of *unconstitutional* segregation in Washington schools, many schools would nonetheless be segregated in fact under Initiative 350. The initiative is therefore preempted by federal statutes that prohibit school segregation, regardless of cause, and that have the purpose of reducing such segregation.[43]

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), bans racial discrimination in programs receiving federal financial assistance. In *Lau v. Nichols*, 414 U.S. 563, 568 (1974), this Court interpreted Title VI as prohibiting discriminatory effect "even though no purposeful design is present." Although Title VI was interpreted as going no farther than the Constitution with respect to purposeful conduct *benefiting* minorities in *Regents of the University*

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[43] Although this rationale was not relied upon in the Court of Appeals, the cause of action was stated in appellees' complaint, and "the prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). *See also New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

of California v. Bakke, 438 U.S. 265 (1978), a plurality of the Court in *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980), described *Lau* approvingly as not requiring purpose. Moreover, interpreting Title VI as applying to disparate impact is consistent with Title VII of the same act. *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1330-31 (3d Cir. 1981) (en banc).

Regardless of the proper interpretation of Title VI as a general matter, its interpretation as to public school segregation has been determined by Congress. The Emergency School Aid Act specifies that Title VI "shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation." 20 U.S.C. § 3193(b) (Supp. III 1979).

This language is that of the version of the Stennis amendment analyzed by this Court in *Board of Education v. Harris*, 444 U.S. 130 (1979), as not requiring purpose. A different version of the Stennis amendment appears as part of Title VI, 42 U.S.C. § 2000d-6 (1976), and seems to preserve whatever distinction there might be between purposeful and nonpurposeful discrimination under Title VI. 444 U.S. at 146 n.10 and 150 n.13. But the language applying Title VI specifically to schools expressly leaves off the second half of that version and thus, with respect to school segregation, eliminates whatever distinction there might otherwise be. That is consistent with the regulations administering Title VI with respect to schools; those regulations do not require a showing of purpose. 34 C.F.R. § 100.3(b)(1)(iii) and (b)(2) (1981). *See generally* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L.J. 1 (1981).

Because mandatory student assignments were found in the circumstances here to be essential to desegregation, Initiative 350 violates and is preempted by Title VI. 42 U.S.C. § 2000h-4 (1976); *see Washington v. Washington State*

Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 695 (1979).

Moreover, Congress has separately stated its purpose to "encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students." 20 U.S.C. § 3192(b)(2) (Supp. III 1979). As this Court put it, the statute "indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, de facto as well as de jure . . . ." *Harris*, 444 U.S. at 141. By flatly prohibiting the voluntary action the statute seeks to encourage, Initiative 350 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

6. ***Conclusion***

The involvement of this Court and the lower federal courts in desegregating this nation's schools has been necessary but troubled. Court intervention increases resentment, decreases flexibility and community involvement, and both results from and contributes to delay. Seattle, Tacoma, and Pasco developed solutions that promised realistically to work, and to work now. If they cannot act absent court order, or if it is only uncertain whether they can act absent court order, there will be no action until the court takes control. The affirmative duty will be a nullity, and Washington school districts will rejoin those districts across the country that have abdicated responsibility to the courts on this vital national issue.

D. The Court of Appeals Correctly Found the Successful School District Plaintiffs Entitled to Their Costs and Attorney's Fees

The Court of Appeals properly reversed the District Court's denial of the school district plaintiffs' costs and

attorney's fees.[44] As the Court of Appeals recognized, Congress intended the applicable attorney's fees statutes to authorize the award of attorney's fees to publicly as well as privately funded plaintiffs, without regard to the ability of the State to pay. This is shown by the express language of the statutes and their purpose and legislative history.[45]

1. ***Statutory Bases for Award of Attorney's Fees***

The two statutes authorizing an award of fees here are 20 U.S.C. § 3205 (Supp. III 1979), a section of the Emergency School Aid Act, and 42 U.S.C. § 1988 (1976), the Civil Rights Attorney's Fees Awards Act of 1976.[46] Section 3205 provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 is phrased similarly, but applies to violations of 42 U.S.C. § 1983 (1976), and other provisions.

The school district plaintiffs met all express requirements for the award of fees under these statutes. The District Court entered a final order against the State for violation of the

[44] The Court lacks appellate jurisdiction over this issue, since it does not involve the constitutionality of a state statute. 12 *Moore's Federal Practice* ¶ 435.01[2] (1981). Nor does this issue satisfy the considerations governing review on certiorari. Rule 17.1.

[45] In the courts below, the United States supported the school district plaintiffs' right to an award of fees.

[46] Section 3205 was codified at 20 U.S.C. §1617 prior to reenactment in identical form, effective October 1, 1979, as part of the Education Amendments of 1978, Pub. L. No. 95-561.

Fourteenth Amendment and § 1983. A violation of the Fourteenth Amendment is necessarily also a violation of Title VI. These proceedings were necessary to bring about compliance with federal law. Finally, the school district plaintiffs are prevailing parties other than the United States.

2. ***An Award of Fees Serves the Congressional Purposes***

No significant differences divide the language, purposes, or application of § 3205 and § 1988. As this Court has noted, the similarity of language between the provisions authorizing the award of attorney's fees under the Emergency School Aid Act and the Civil Rights Act of 1964 "is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). As was true of the provisions construed by this Court in *Northcross*, § 3205 and § 1988 share "a common *raison d'etre*." 412 U.S. at 428. The enactment of both provisions was for the same purpose: to encourage enforcement of the law in these areas and to deter violations of such law. *See id.; Carey v. Piphus*, 435 U.S. 247, 258 n.11 (1978). Thus, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress intended that § 1988 be given the same liberal construction that had been accorded the predecessor of § 3205. S. Rep. No. 94-1011, at 3 (1976).

In particular, Congress commanded that courts applying § 1988 adhere to the rule established by this Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), that the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 94-1011, at 4 (1976); H.R. Rep. No. 94-1558, at 6 (1976). At the time § 1988 was drafted, this Court had applied that standard to § 3205. *Northcross, supra*, 412 U.S. at 428. It has since been held applicable to § 1988. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980).

Thus, although the statutes entrust the *amount* of the fee award to the discretion of the district court, "the trial court's discretion is narrow." *Dawson v. Pastrick*, 600 F.2d 70, 79

(7th Cir. 1979), *cert. denied*, 450 U.S. 919 (1981). Absent special circumstances rendering an award unjust, there is no discretion to deny totally an award. *Id.* Such discretion "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." S. Rep. No. 94-1011, at 3 (1976) (quoting from *Hall v. Cole*, 412 U.S. 1 (1973)).

3. ***No Special Circumstances Exist Here***

Nothing inherent in the mere circumstance that the legal services rendered here were publicly funded makes an award of attorney's fees unjust. The courts have held with substantial uniformity that government funding of plaintiffs' legal services is "irrelevant to the computation of attorney's fees." *Donaldson v. O'Connor*, 454 F. Supp. 311, 313 (N.D. Fla. 1978); *accord, Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Regalado v. Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978).

The school district plaintiffs requested the State of Washington to fulfill its duty to challenge or otherwise remove the constitutional infirmities of Initiative 350. Had the State responded, it would not now be liable for the school district plaintiffs' attorney's fees. Because the State did not respond, the school district plaintiffs were faced with a choice between complying with a statute they believed unconstitutional, in violation of constitutional duty and the board members' oaths of office, or vigorously challenging the statute, but only by temporarily diverting public funds (only a portion of which comes from the State) from direct education. The boards' choice to protect students' constitutional rights must not be considered a "special circumstance."

Had the school districts chosen to ignore their duty to comply with the Constitution, they would have been made defendants and would now share the State's liability for the attorney's fees and costs of the other plaintiffs. Without the legitimate expectation that a successful challenge of Initiative 350 would entitle them to their costs incurred in that challenge, these plaintiffs might have been reluctant to vindicate rights that Congress has deemed of "the highest priority." Moreover, even if a fee award were not necessary to encourage these plaintiffs to vindicate federal rights, "assessing fees against defendants in all circumstances may deter wrongdoing in the first place." *Dennis v. Chang*, 611 F.2d at 1306 n.12; *accord, Carey v. Piphus, supra.*

If Congress had intended school districts funded in part by states to divert their funds from education, it could have easily so stated, just as it did with respect to the United States as plaintiff. The State is asking this Court to write an exception into the plain language of the statutes based not on any policy reflected in the statutes themselves but on a countervailing policy of the State's "fiscal crisis." In effect, the State is asking the Court to put a price on civil rights, and weigh that price against the State's interest in the integrity of its treasury.[47] Congress was well aware of the limits of state resources when it enacted these statutes, yet no such exception was provided. S. Rep. No. 94-1011, at 5 (1976).[48]

The State's assertion that limited state budgets might outweigh Congress' policies of deterring constitutional violations and encouraging vindication of constitutional rights is a questionable proposition. More important, it is up to Congress, not this Court, to balance the competing considerations advanced here by the State. Current efforts by the State and others to convince Congress to amend these

[47] Instead, the possibility of fee awards should provide the State with an incentive to avoid unconstitutional action during fiscal crises.

[48] The State's suggestion that Congress exceeded its authority in this determination is refuted by *Hutto v. Finney*, 437 U.S. 678 (1978).

statutes to preclude fee awards to publicly funded entities, efforts that have specifically pointed to the result in this case, have so far been unsuccessful. This Court should reject appellants' plea that it do what Congress has refused to do: amend the statutes. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (refusing to depart from plain language of § 1988).

4. ***An Award is Due Other Plaintiffs***

Even if the districts themselves were not entitled to an award of fees, the individual plaintiffs who brought this suit with them would be. The fact that the individual plaintiffs did not fund this litigation does not extinguish their right to attorney's fees. Antitrust and civil rights plaintiffs routinely obtain court awarded fees even though they had not expended any sums. In *Brandenburger v. Thompson*, 474 F.2d 885, 889 (9th Cir. 1974), the Ninth Circuit stated:

> [T]he fact that the plaintiff was not obligated to pay the ACLU for its services is not a bar to an award of attorneys' fees. All that is required is the existence of an attorney-client relationship . . . Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant.

Accord, H.R. Rep. No. 94-1558, at 8 n.16 (1976) ("a prevailing party is entitled to counsel fees even if represented by an organization").

CONCLUSION

The judgment of the Court of Appeals should be affirmed. Initiative 350 is unconstitutional, and the school district plaintiffs are entitled to their attorney's fees and other reasonable expenses.

DATED this 25th day of January 1982.

Respectfully submitted,

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No. 81-9

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an initiative establishing a statewide neighborhood school policy violates the Equal Protection Clause of the Fourteenth Amendment.[1]

[1] Appellants also challenge an award of attorneys' fees to parties other than the United States. The United States does not address that issue.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-9

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. B-1 to B-29) is reported at 633 F. 2d 1338. The opinion of the district court (J.S. App. A-1 to A-36) is reported at 473 F. Supp. 996.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1980, and a petition for rehearing was denied on March 26, 1981 (J.S. App. E-1). A notice of appeal was filed on May 18, 1981 (J.S. App. D-1 to D-6). This Court noted probable jurisdiction on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

This case, like *Crawford* v. *Board of Education*, No. 81-38, involves a constitutional challenge to a state restriction on the use of mandatory nonneighborhood student assignments to alleviate racial imbalance not caused by de jure segregation. Here, the challenged restriction was enacted shortly after Seattle School District No. 1, the State of Washington's largest school district, abandoned its traditional policy favoring neighborhood schools and implemented a plan of race-conscious student assignments to create racial balance in the district's schools. A principal component of the plan was the mandatory busing of entire neighborhoods of students to schools beyond those closest to the students' homes. Initiative 350, adopted by a majority of Washington voters at a statewide referendum, reversed the action taken by the school district by establishing a state educational policy favoring neighborhood schools. The Initiative generally prohibits mandatory busing beyond the nearest or next nearest school to a student's home. The Seattle School District, joined by two other school districts and certain individual plaintiffs, commenced this litigation to challenge the constitutionality of Initiative 350. This case is here on appeal from the decision of the court of appeals, which concluded that, in adopting a statewide neighborhood school policy, Initiative 350 violates the Equal Protection Clause of the Fourteenth Amendment.

1. Seattle School District No. 1, a municipal corporation created under the laws of the State of Washington, encompasses an area substantially coterminous with the City of Seattle (J.S. App. A-1 to A-2). Racial minorities historically have accounted for a substantial proportion of the district's enrollment (Pltf. Exh. 8). At present, the district has an enrollment of approximately 54,000 students, approximately 37% of whom are either black, Asian, American Indian or Hispanic (J.S. App. A-2). For at least the past 18 years, the district has taken steps to alleviate the isolation of these minori-

ties from the rest of the district's student community (J.S. App. A-14 to A-18).[2]

2. In April 1976, the district hired a new school superintendent and specifically directed him to devise a program to racially balance the district's schools (Moberly Affidavit at 1-2; Pltf. Exh. 6 at 7). The superintendent organized a special staff for that purpose, and conducted public meetings to discuss the approach to be taken by the district in promoting racial balance within its schools (Moberly Affidavit at 2-3). According to the superintendent, these meetings stressed the use of voluntary strategies to achieve such balance (*id.* at 2).

During this period, substantial pressure was exerted on the district to take effective action to achieve racial balance (Moberly Affidavit at 4). Local or state affiliates of the National Association for the Advancement of Colored People, the American Civil Liberties Union and the National Urban League, as well as the Church Council of Greater Seattle, each threatened to file suit should the district not make progress toward racial balance (*id.* at 4-5).[3] On May 25, 1977, the district received

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[2] In 1963, when racial minorities accounted for approximately 15% of the district's enrollment (Pltf. Exh. 8), the district initiated a series of voluntary racial transfer programs (J.S. App. A-16). Under these programs, the district promoted and has continued to promote the transfer and transportation of students to schools outside their residential areas whenever such transfers have promised to alleviate racial imbalance (*ibid.*). These programs had approximately 1,400 participants in 1977 (Def. Exh. A-99 at Exh. H).

[3] On April 20, 1977, the local branch of the NAACP filed an administrative complaint with HEW's Office for Civil Rights pursuant to Title VI of the Civil Rights Act of 1964, charging the district with having "taken action which it knew, or should have known, would have segregative results, in continuing or intensifying racial segregation in the Seattle Public Schools" (Pltf. Exh. 69 at 12-15). The complaint requested an administrative investigation and HEW scheduled such an investigation for the fall of 1978 (*id.* at 7, 15). The investigation was ultimately postponed as a result of the district's implementation of a mandatory busing program in September of 1978 (*id.* at 7-8, 16-18).

a letter from the mayor of Seattle and the presidents of the Seattle Chamber of Commerce, the Municipal League of Seattle and King County, and the Seattle Urban League, urging the district to adopt a definition of racial imbalance and to act to eliminate such imbalance in Seattle through an effective program developed and adopted with extensive community involvement (Pltf. Exh. 11). On June 8, 1977, the district passed resolutions defining racial imbalance (Pltf. Exh. 9)[4] and committing the district to eliminate all such imbalance by the start of the 1979-1980 school year (Pltf. Exh. 10).[5]

In September 1977, a "magnet" schools program was implemented by the district (J.S. App. A-16). Developed in late 1976 and early 1977, the program involved significantly enhancing the educational attractiveness of a number of schools, to which students could voluntarily transfer when their doing so promoted racial balance (*ibid.*). Approximately 2,600 voluntary racial transfers were produced by the program, surpassing the district's goal of 1,000 transfers (Def. Exh. A-99 at Exh. H).[6] But, although a September 16, 1977 open letter to Seattle citizens from the district superintendent called the "substantial success" of the program "extremely encourag-

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[4] "Racial imbalance" was defined as "the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body" (Pltf. Exh. 9). According to this definition, 23 of the district's 112 schools were at that time "racially imbalanced" (Pltf. Exh. 8).

[5] The resolution directed the district superintendent to eliminate racial imbalance through continuation of the voluntary racial transfer programs that had been in operation since 1963, through implementation of a magnet schools program, and through adoption, upon board approval, of such additional measures as were necessary (Pltf. Exh. 10).

[6] Other voluntary racial transfer programs in the district produced approximately 1,400 additional racial transfers in 1977. See note 2, *supra*.

ing" (*id.* at Exh. F), the superintendent concluded that, because of demographic changes in the district, the program was making little headway toward the achievement of racial balance (Def. Exh. A-118 at 50). The superintendent was of the opinion that approximately 8,000 additional transfers would be needed (Def. Exh. A-99 at Exh. B), and district citizens were invited to participate in a series of community meetings scheduled for October and November 1977 to discuss how to achieve complete racial balance by the beginning of the 1979-1980 school year (*id.* at Exh. F).

At the October and November meetings, the district presented for public response five alternative racial balancing plans considered capable of achieving the 1979-1980 goal of complete racial balance (Def. Exh. A-99 at Exh. H). Three of the plans, each drafted by the district, relied on voluntary measures as a first strategy for achieving such balance, with provisions for mandatory measures should the voluntary measures prove ineffective (*ibid.*). Two of the plans, one drafted by the district and one by the Seattle Urban League, placed primary reliance on mandatory measures (*ibid.*). After the meetings, the district superintendent concluded that "the one thing that came through there was that everybody wanted a voluntary movement" (Def. Exh. A-118 at 110); it was "quite evident" that the community favored a voluntary plan (*ibid.*).

Notwithstanding his perception of community desire, in late November the superintendent submitted a mandatory racial balancing plan to the district board of education for its consideration. The plan, which had not been previously presented to the community, was labelled "The Seattle Plan" and relied on extensive mandatory student reassignments and busing to meet the board's 1979-1980 racial balancing deadline (J.S. App. A-17 to A-18).[7] A

[7] The superintendent recommended a mandatory plan because, based upon his opinion of the district's ability to raise funds, "the only realistic and cost-efficient program was one which did not (1) require large yearly expenditures to attract and recruit voluntary

principal component of the plan, intended in part to achieve racial balance without destroying the students' sense of their "ethnic identity" (Moberly Affidavit at 19; Pltf. Exh. 7 at 15), was the mandatory reassignment of entire neighborhoods of students to schools beyond those closest to the students' homes (J.A. App. A-17 to A-18).

In early December, after the district superintendent's recommendation had been made public, but before the board had met to vote on whether or not to adopt it, a number of Seattle parents met and organized a group called the Citizens for Voluntary Integration Committee ("CiVIC") (Pltf. Exh. 40 at Exh. 3). At the initial organizational meeting, the parents voiced objections to the mandatory Seattle Plan and called upon the school board "to delay their decision so we can present a truly voluntary program that will work" (*ibid.*). After the board approved a resolution on December 14, 1977, setting forth and adopting the essentials of the mandatory Seattle Plan (Pltf. Exh. 12),[8] CiVIC organized itself as a nonprofit corporation under Washington state law (Pltf. Exh. 40) and established an education committee to draft an effective voluntary racial balancing plan,[9] a legal committee to pursue an injunction against implementation of the mandatory Seattle Plan, and a legislative committee to draft a statewide initiative favoring neigh-

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transfers or (2) incur the inefficiencies of such large-scale voluntary transfers before an inevitable 'mandatory backup' was utilized" (Moberly Affidavit at 9-10).

[8] Members of CiVIC filed an unsuccessful state court suit to enjoin this action by the board. *Roe* v. *Seattle School District No. 1*, King County Superior Court, Cause No. 838291. The board's general counsel reported to the board prior to its approval of the resolution that the plaintiffs "were not quarreling with desegregation and were not trying to prevent desegregation. They were merely quarreling with this specific plan implementation" (Def. Exh. A-99 at Exh. J).

[9] CiVIC's plan, announced in June 1978, called for achievement of racial balance through enhancement of educational programs and adoption of an "open enrollment" policy (Pltf. Exhs. 49, 50).

borhood schools. See Pltf. Exh. 48. In March 1978, the district board formally adopted the Seattle Plan and made arrangements for its implementation at the beginning of the 1978-1979 school year (J.S. App. A-17; Moberly Affidavit at 12).

Contemporaneously with the district's formal adoption of the Seattle Plan, CiVIC launched its campaign for Initiative 350 (Pltf. Exh. 51).[10] Drafted by CiVIC for submission to state voters at the 1978 general election (J.S. App. A-19), Initiative 350 provides that (Wash. Rev. Code Ann. § 28A.26.010 (Cum. Supp. 1981)): "[N]o school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place

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[10] CiVIC conducted an intensive multimedia campaign for the Initiative in Seattle and across the state (Pltf. Exhs. 38, 39; Def. Exhs. A-113, A-114). The campaign urged citizens to vote for the Initiative because it would prohibit use of mandatory, nonneighborhood measures to achieve racial balance (Pltf. Exh. 2). The campaign argued that such measures should be prohibited because they (1) increase racial imbalance by inducing " 'white flight' " (J.S. App. A-21); (2) reduce local control by parents over the education of their children (see, *e.g.*, Pltf. Exh. 51 at 21); (3) are promoted by federal bureaucrats unconcerned with such local parental control (*ibid.*); (4) do not measurably improve educational quality for either minority or majority students (*id.* at 28); (5) require large sums of money to be spent on transportation that could be better spent on education (*id.* at 11); and (6) are state financed and thus paid for by citizens statewide (*ibid.*). CiVIC maintained that the Initiative was constitutional because there was no reason to believe that any school authorities in Seattle or Washington had ever intentionally segregated students on the basis of race, and because the Initiative specifically recognized the authority of courts to adjudicate constitutional issues involving schools (see, *e.g.*, Pltf. Exh. 56). CiVIC's materials supporting Initiative 350 stressed that racial imbalance could be eliminated effectively by the use of voluntary methods (see, *e.g.*, *id.* at 3-5). The district court below specifically found that the campaign was conducted in a legal and responsible manner, with no appeals made to racist sentiments (J.S. App. A-22 to A-23). CiVIC "deliberately took steps to avoid race becoming an issue in the campaign * * *" (*id.* at A-23).

of residence * * *." [11] Initiative 350 allows school assignments to be made beyond the nearest or next nearest school only "[i]f a student requires special education, care or guidance"; "[i]f there are health or safety hazards" between the student's residence and the nearest or next nearest school; or if the nearest or next nearest school is "unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (*ibid.*). Initiative 350 also expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools" (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981)).

The district opened the 1978-1979 school year under the mandatory racial balancing plan (Moberly Affidavit at 14), and on November 7, 1978, Initiative 350 was approved by approximately 66% of the voters statewide (J.S. App. A-22).[12] The Initiative failed in only two

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[11] The Initiative explains that the prohibition on "indirect[]" student assignments beyond the nearest or next nearest school (Wash. Rev. Code Ann. § 28A.26.030 (Cum. Supp. 1981)):

> includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

In legal opinions widely circulated during the campaign (J.S. App. A-21), CiVIC consistently maintained that this section of the initiative does not prohibit the redefinition of attendance zones, pairing, etc. to achieve racial balance, but rather merely requires that after such action, students be assigned to the nearest or next nearest school offering their course of study (Pltf. Exh. 56 at 9-11, 19).

[12] The voters' adoption of Initiative 350 was presaged by various professional public opinion polls. One such poll, conducted for the district in July 1978, found that of those parents who stated that they were aware of the Seattle Plan (approximately 90% of those surveyed), approximately 10% "strongly favored" the plan, 25%

legislative districts, each in Seattle (*ibid.*). In Seattle as a whole, however, the Initiative was approved by approximately 61% of the voters (*ibid.*).[13]

3. On November 30, 1978, the district, together with the Tacoma and Pasco school districts[14] and certain individual plaintiffs, brought this action against the State of Washington and various state officials in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth

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"somewhat favored" it, 19% "somewhat opposed" it, and 46% "strongly opposed" it (Def. Exh. A-99 at Exh. G). The principal concern voiced by those opposing the plan was that "children should stay in their own neighborhoods" (*ibid.*). Another poll of parents in the Seattle area found that 65% of minority parents opposed mandatory nonneighborhood student transfers (Def. Exh. A-137). A poll conducted for CiVIC in October 1978 found that approximately 64% of those interviewed would vote in favor of Initiative 350 (Def. Exh. A-114 at Exh. 1). More than half of these persons explained they would do so because they believed children should attend neighborhood schools (*ibid.*).

[13] CiVIC issued a statement on November 8, 1978 calling the Initiative's adoption "a great victory," and emphasizing that Initiative 350 "should *not* in any way be viewed as a vote against integration" but rather as "an affirmation of the concept of the neighborhood school and the right of parents to control their children" (Pltf. Exh. 51 at 29).

[14] Tacoma School District No. 10 and Pasco School District No. 1 are, like the Seattle district, municipal corporations created under the laws of the State of Washington (J.S. App. A-2 to A-3). The Tacoma district has an enrollment of approximately 29,000 students, approximately 20% of whom are either black, Asian, American Indian or Hispanic (*id.* at A-2). The Pasco district has an enrollment of approximately 5,300 students, approximately 27% of whom are either black, Asian, American Indian or Hispanic (*id.* at A-2 to A-3). For the past 15 years, the Tacoma district has employed a voluntary transfer program and more recently school closures and a magnet schools program to alleviate racial imbalance in its schools (*id.* at A-10 to A-14). For the past 16 years, the Pasco district has employed school closures and busing to alleviate racial imbalance in its schools (*id.* at A-9 to A-10).

Amendment (J.S. App. A-1 to A-3, A-6). Numerous parties later intervened in the litigation (*id.* at A-3 to A-6), including CiVIC, which intervened on behalf of the defendants, and the United States, which intervened on behalf of the plaintiffs under 42 U.S.C. 2000h-2.[15]

Following issuance of both a temporary restraining order and a preliminary injunction, the district court entered an order permanently enjoining enforcement of Initiative 350 (A. 8-9). The district court concluded that the Initiative violates the Equal Protection Clause for three reasons (J.S. App. A-27):

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

The court of appeals affirmed the district court by a divided vote (J.S. App. B-1 to B-29). Relying on this Court's decision in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and a three-judge district court opinion in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the court of appeals held that Initiative 350 is unconstitutional because it embodies an impermissible legislative classification based on race (J.S. App. B-4). The court stated (*id.* at B-7 to B-8):

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[15] Other plaintiff intervenors alleged that the plaintiff school districts operated unconstitutional dual school systems (J.S. App. B-2). As a result of these allegations, the district court bifurcated the litigation (*ibid.*). The first phase, from which this appeal is taken, was limited to the question of the constitutionality of Initiative 350 (*ibid.*). Second phase issues relating to the allegations of de jure discrimination by the plaintiff school districts were not reached at trial because of the court's ruling on Initiative 350 (*ibid.*).

> Applying the[] principles [of *Hunter* and *Lee*] here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classification of *Hunter* and *Lee*.

Although the court of appeals acknowledged that absent existing de jure segregation the school districts themselves could adopt a neighborhood school policy without offending the Equal Protection Clause (J.S. App. B-10), the court concluded that "[t]he interest of the State of Washington in mandating a state-wide policy of neighborhood schools must * * * fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy" (*id.* at B-11). The court held the Initiative was unconstitutional because it was not supported by a compelling state interest (*ibid.*), and therefore found it unnecessary to address whether the district court had erred in holding that the Initiative was motivated by a discriminatory purpose and is constitutionally overbroad (*id.* at B-4).

In dissent (J.S. App. B-18 to B-29), Judge Wright stated that the majority's reliance on *Hunter* and *Lee* was misplaced and that Initiative 350 does not create a racial classification by permitting isolated deviations from the neighborhood school policy for safety, health, and special educational purposes. See J.S. App. B-18 to B-24. Judge Wright also reached the other grounds relied on by the district court in invalidating the Initia-

tive. The district court's factual findings on intent, Judge Wright concluded, had insufficient record support to establish that Initiative 350 was motivated by any racially discriminatory intent (*id.* at B-24 to B-27). Judge Wright also rejected the district court's "overbreadth" analysis because Section 6 of the Initiative (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981)) permits departures from the neighborhood school policy when necessary to rectify constitutional violations, and thus does not threaten interference with the vindication of constitutional rights (J.S. App. B-27 to B-29).

SUMMARY OF ARGUMENT

Initiative 350 expresses the policy of the State of Washington in favor of neighborhood schools. Contrary to the conclusion of the courts below, it does not embody an explicit racial classification. Rather, the classification created by the Initiative is between those seeking mandatory nonneighborhood student assignments for reasons of health, safety, or other particularized needs of individual students, and those seeking mandatory nonneighborhood student assignments for any other purpose, including conservation of fiscal resources, balancing of classroom size or alleviation of racial segregation. The Initiative does not split the citizenry into racially identifiable subgroups, and therefore does not classify persons according to race.

Washington's neighborhood school policy "on its face treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)). In these circumstances, a violation of the Equal Protection Clause may be found only if the neighborhood school policy imposes "special burdens on racial minorities within the governmental process" (*ibid.*) not justified by some compelling state interest (*id.* at 392). Initiative 350 imposes no such special burdens.

Initiative 350 does not radically restructure the political process of Washington, or impermissibly restrict the capability of local school boards to promote racial bal-

ance. The Washington Constitution entrusts formulation of educational policy to the state, and Initiative 350 is an exercise of the state's constitutional responsibilities in this field. The Initiative, furthermore, does not subject state legislation sought by racial groups or other minorities to procedures more burdensome than those applicable to any other type of legislation. Washington has long utilized statewide initiatives to establish public policy, and this "procedure for democratic decisionmaking" does not deny "any person 'the equal protection of the law'" (*James* v. *Valtierra*, 402 U.S. 137, 143 (1971)). Initiative 350, at most, redistributes among governmental units the authority to assign students to schools in local jurisdictions, without making any change in the method for obtaining yet another reallocation of that authority in the future.

Initiative 350 embodies a constitutionally permissible policy favoring neighborhood schools. While the court of appeals recognized that the school districts involved in this litigation could validly adopt a neighborhood school policy, it nevertheless held that imposition of such a policy by a superior decisionmaking authority—the state electorate—was unconstitutional. The court of appeals was wrong. Absent a finding of de jure segregation, decisions concerning the public schools of the State of Washington lie fully within the prerogative of the state. Under Article IX, Section 1 of the state constitution, Washington has complete authority to establish and define educational policy for its public school system. This includes the right to make tradeoff choices between the advantages and disadvantages of neighborhood schools on the one hand, and busing on the other. No principle of federal constitutional law requires that the state, in dividing governmental responsibilities between local and state authority, must leave every—or no—aspect of student assignment policy to local discretion.

Finally, although the district court found that Initiative 350 was unconstitutional because it was enacted for a discriminatory purpose and was overbroad, neither of these grounds justifies invalidating the enactment. A discriminatory purpose in enacting a statute may be found only after a balanced analysis of the factors set out by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The district court's analysis of these factors failed to take into account Washington's undisputed history of racial integration, and the fact that the benefits of neighborhood schools flow to minorities as well as the racial majority. Adoption of a neighborhood school policy does not raise per force an inference of racial discrimination; such a policy is entirely consistent with a good faith belief that the advantages for minorities of a neighborhood school system outweigh the advantages for them of a racial balancing system. The district court's finding regarding the overbreadth of the Initiative is similarly flawed. Even assuming that an overbreadth challenge may be properly entertained outside the areas of First Amendment rights, the court erred in rejecting the state Attorney General's clearly constitutional interpretation of the Initiative in favor of an invalidating construction of the measure. Furthermore, there is no real or substantial threat that Initiative 350 will impair efforts to eradicate de jure segregation in Washington, as there is no evidence that any such discrimination exists within the state.

ARGUMENT

Initiative 350 expresses the State of Washington's policy that, except where infeasible for reasons of health and safety, or because of special educational needs or unfit or inadequate conditions, no school children within the state may involuntarily be assigned to attend any school other than that nearest or next nearest to their residences. A policy in favor of neighborhood schools has a long history of acceptance both within and without the State of Washington.[16] And, notwithstanding the failure of such a policy to alleviate racial isolation resulting from residential patterns,[17] utilization of neighborhood schools by a school district has never been held to constitute a per se violation of the Equal Protection Clause. *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 (1976) (Powell, J., concur-

[16] Indeed, a neighborhood school policy is currently adhered to by all Washington school districts except the appellee districts even though enforcement of Initiative 350 is presently enjoined (see App. Br. 4, 15), and the district court concluded that "the Seattle School District has traditionally adhered to a policy of the assignment of children to their neighborhood schools" (J.S. App. A-22 to A-23). The policy is also embodied in the Equal Education Opportunities Act of 1974, wherein Congress declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. 1701(a)(2). See also 20 U.S.C. 1714(a) ("No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student"); *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980); *Morales* v. *Shannon*, 516 F.2d 411 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir.), cert. denied, 423 U.S. 1000 (1975).

[17] It is a "familiar demographic characteristic of this country" for "citizens of common national or ethnic origins to form homogeneous residential patterns in our cities." *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 n.5 (1976) (Powell, J., concurring).

ring); *United States* v. *Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *Diaz* v. *San Jose Unified School District*, 612 F. 2d 411, 415 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"). See also *NAACP* v. *Lansing Board of Education*, 559 F. 2d 1042, 1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 60-61 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967). The court of appeals' conclusion that the State of Washington's adoption of a neighborhood school policy violates the Equal Protection Clause is therefore without precedent.

I. Initiative 350 Does Not Classify Persons According to Race

Both the district court and the court of appeals majority held that Initiative 350 creates a constitutionally suspect racial classification because it "treats a single purpose for student assignment, racial balancing, differently from all others" (J.S. App. B-7). This proposition is both factually and analytically unsound. Under the Initiative, mandatory student assignments may deviate from the neighborhood school policy only for certain specified purposes. Mandatory assignments for any purpose not specified—including not only racial balancing but also, for example, numerical balancing of class sizes —are restricted to the schools nearest or next nearest to the students' residences. Accurately viewed, therefore, the Initiative creates two categories of purposes for student assignments, neither of which is restricted to racial balancing.

Initiative 350 does not classify persons according to race in any respect. The classification created by the Initiative is between those seeking mandatory non-neighborhood student assignments for reasons of health, safety, or special educational needs or in response to unfit or inadequate conditions and those seeking manda-

tory nonneighborhood student assignments for any other purpose, including conservation of fiscal resources, balancing of classroom size, or alleviation of racial segregation in the neighborhood schools. While the latter class may not obtain mandatory nonneighborhood student assignments upon the mere approval of the local school board, as can members of the former class, the burden thus created is not imposed along racial lines. There is no basis for a court to infer that even a class limited to those persons seeking mandatory nonneighborhood student assignments to achieve racial balance is racially identifiable. Indeed, as Judge Wright noted in dissent, the "policy question" that lies "at the heart" of Initiative 350—"whether student assignments beyond the next nearest school should be used to overcome *de facto* segregation" (J.S. App. B-21)—simply does not split the citizenry into discrete racial subgroups.[18]

The legislative classification created by Initiative 350 is thus analogous to the classification at issue in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). In *Feeney* this Court rejected the contention that a Massachusetts statute granting an absolute lifetime employment preference to veterans classified persons on the basis of sex. While noting that the veteran prefer-

[18] The racial heterogeniety of the class allegedly disadvantaged by Initiative 350 contrasts rather sharply with the racial makeup of the disadvantaged class in *Hunter* v. *Erickson*, *supra*. Although it could be argued that the classification created by the city charter amendment in *Hunter* was not "racial" because advocates of fair housing legislation are not racially identifiable, the fact remains that the special political obstacle created to block future fair housing ordinances in *Hunter* operated to the peculiar disadvantage of minorities. As the Court specifically noted in *Hunter*, the racial "majority needs no protection against discrimination" in housing opportunities (393 U.S. at 391). By contrast, rescission of a racial balancing program in favor of a neighborhood school policy like the one embodied in Initiative 350 does not work exclusively to the disadvantage of any racial group. The perceived advantages of neighborhood schools—*i.e.*, increased community support and input, enhanced safety, reduced costs, and improved home-school relations (J.S. App. A-23)—flow to both minority and nonminority students.

ence statute "exclude[d] significant numbers of women from preferred state jobs," the Court concluded (442 U.S. at 275):

> [T]his is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by [the veterans' preference statute] to permit the inference that the statute is but a pretext for preferring men over women.

To paraphrase the *Feeney* court, adoption of a neighborhood school policy cannot be explained solely on racial grounds. Preference for neighborhood schools is not uniquely limited to the racial majority. Conversely, preference for mandatory busing to achieve racial balance is not uniquely limited to racial minorities. To the contrary, significant numbers of both classes lie on either side of the mandatory busing controversy. Too many minorities are opposed to the implementation of widespread mandatory busing and the consequent abandonment of the advantages of neighborhood schools to permit the inference that establishment of a neighborhood school policy is but a pretext for overriding the constitutional prerogatives of the racial minority.[19] Initiative 350, therefore, clearly does not classify persons according to race. Cf. *Gordon* v. *Lance*, 403 U.S. 1, 5 (1971) (state constitutional provision limiting bonded indebtedness of the state does not violate the Equal Protection Clause as Court could discern "no *independently identifiable* group or category that favors bonded indebtedness over other forms of financing") (emphasis added); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (holding, in contrast to *Hunter* v. *Erickson*, *supra*, that a state-required referen-

[19] See notes 12, *supra*, & 42, *infra*.

dum on all low-rent public housing projects is not a " 'distinction based on race' ").[20]

II. The State of Washington's Adoption of a Neighborhood School Policy Imposes no Special Burden on Racial Minorities Within the Governmental Process

1. A neighborhood school policy that, like the State of Washington's, "treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)), violates the proscription of the Fourteenth Amendment only where it "places special burdens on racial minorities within the governmental process" (*ibid.*) that are not justified by some compelling state interest (*id.* at 392). The State of Washington's adoption of Initiative 350 imposes no special burden upon minorities within the state's governmental process.

In *Hunter* v. *Erickson*, *supra*, this Court upheld a constitutional challenge to a city charter amendment that required city housing ordinances prohibiting invidious discrimination to be approved at a regular general election, while ordinances regulating housing on other grounds became effective merely upon approval by the city council.[21] The Court found that the amendment violated the

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[20] A race-neutral law violates the equal protection clause only if it has a disproportionately adverse impact upon a racial minority that can be traced to purposeful discrimination. *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 273-274. See also *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Because the court of appeals majority concluded that Initiative 350 classifies persons on the basis of race, it did not consider whether enactment of the Initiative was motivated by purposeful discrimination. If, as the United States contends, Initiative 350 does not establish a racial classification, the question whether the adoption of the Initiative reflected a discriminatory purpose gains substantial importance in the ultimate resolution of this litigation. See Point IV, *infra*.

[21] The amendment also differentiated fair housing ordinances from other ordinances in at least two other respects. The referendum required under the amendment could be obtained only through a petition signed by 10% of the city's voters; other

Equal Protection Clause because it expressly targeted ordinances designed to eliminate racial discrimination in housing and subjected them to a special legislative process that "obviously made it substantially more difficult to secure [their] enactment" (393 U.S. at 390). The Court emphasized that the "mere repeal of an existing ordinance" would not violate the Fourteenth Amendment (*id.* at 390 n.5), but concluded that the amendment's "required * * * approval of the electors before any future [fair housing] ordinance could take effect" (*id.* at 390) visited a "special burden[] on racial minorities within the governmental process" (*id.* at 391) unjustified by a compelling state interest (*id.* at 392). "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (*id.* at 393). The Court's opinion emphasized that only minorities need the protection of a fair housing law (see note 18, *supra*).

In *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), a three-judge district court applied *Hunter* to invalidate a New York statute explicitly prohibiting race-conscious student assignment by appointed, but not by elected school boards. The statute created "a single exception to the broad supervisory powers the [appointed] state Commissioner of Education exercises over local public education" (318 F. Supp. at 718), and unambiguously applied to "all efforts to achieve racial balance, including such efforts by a school district subject to a pre-existing order to eliminate segregation in its schools" (*id.* at 715). The district court concluded that the statute "structure[d] the internal governmental process in a manner not founded on neutral principles,"

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ordinances could be initiated on petition of seven percent of the voters (393 U.S. at 390). Further, the amendment specifically provided that referendums on fair housing ordinances could be conducted only at regular or general elections, while an expedited special election procedure was ordinarily available for other referendums (*ibid.*).

and thus "operate[d] to disadvantage a minority, a racial minority, in the political process" (*id.* at 720). The statute accordingly was found to deny plaintiffs equal protection of the law.

2. The majority of the court of appeals relied on *Hunter* and *Lee* to conclude that Initiative 350 places special burdens on racial minorities within the political process and therefore violates the Equal Protection Clause. Initiative 350 imposes these burdens, in the court of appeals' view, by "restructur[ing] the state's political and administrative process so as to *remove* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools" (J.S. App. B-11) (emphasis in original) (footnote omitted). As Judge Wright pointed out in dissent, however, *Hunter* and *Lee* are not controlling here (J.S. App. B-18 to B-19). The court erred in concluding that Initiative 350 either "radically restructures the political process of Washington" (J.S. App. B-7) or impermissibly restricts the capability of local school boards to promote racial balance. The Initiative merely limits the discretion of local school districts to draw school attendance zones through an exercise of policymaking authority at the superior, statewide level. It simply does not alter the legislative process in the State of Washington in a way analogous to the measures at issue in *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*.

a. Contrary to the conclusion of the court of appeals, Initiative 350 does not result in any usurpation of "traditional local authority over local school board educational policies" (J.S. App. B-7). In the State of Washington, education is emphatically the responsibility of the state, not the local boards of education. Article IX, Section 1 of the state constitution states that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." See also Article IX, Section 2 ("[t]he legislature shall provide for a general and uniform sys-

tem of public schools"). The Washington Supreme Court has held that the Article IX, Section 1 guarantee of racial equality "does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed *duty*." *Seattle School District No. 1* v. *Washington*, 90 Wash. 2d 476, 499, 585 P.2d 71, 85 (1978) (emphasis in original). In accordance with this duty, the state legislature has an affirmative, judicially enforceable obligation both to define and fully provide "a basic program of education in a 'general and uniform system of public schools.' " 90 Wash. 2d at 522, 585 P.2d at 97.

The state legislature, in fulfillment of this obligation, has established local school districts and has allowed the elected boards of these districts discretion in limited areas of educational administration. However, under state law and practice, these boards do not define and implement local and autonomous educational policies. They act as agents of the state, effectuating at the local level policies announced by the state legislature and explicated by the state superintendent of public instruction and state board of education. See *Moses Lake School District No. 161* v. *Big Bend Community College*, 81 Wash. 2d 551, 556 (1972). See generally Wash. Rev. Code Ann. § 28A.02.020 (Cum. Supp. 1981) (organization of state school system); Wash. Rev. Code Ann. § 28A.03.030 (Cum. Supp. 1981) (powers and duties of superintendent of public instruction); Wash. Rev. Code Ann. § 28A.04.120 (Cum. Supp. 1981) (powers and duties of state board of education). Statewide limitations on local discretion are not uncommon. Whether by mandatory regulations or conditional financing, the state has deeply involved itself in virtually every area of local educational administration. See, *e.g.*, Wash. Admin. Code 392-143-065 (regulating types of tires permissible on local school buses). See generally Wash. Rev. Code Ann., tit. 28A (1970); Wash. Admin. Code, tits. 180, 392. In areas where the state has allowed some local discretion, *e.g.*, in the setting of educational curricula, this discretion typically has been narrowly circumscribed.

See, *e.g.*, Wash Rev. Code Ann. § 28A.58.754(3) (Cum. Supp. 1981) (establishing mandatory statewide "total program hour requirements" and "minimum course mix percentages" for local school districts, but allowing deviations of "up to five percentage points above or below" the minimums "[i]n order to provide flexibility to the local school districts").

As with all matters of educational policy, state involvement in the racially sensitive aspects of local educational administration has been substantial. The state has never abdicated its constitutional policymaking responsibility in this area. The state has long subjected school officials to statewide nondiscrimination requirements,[22] and has long both promoted and regulated local efforts to eliminate racial imbalance. At least since 1970 (see J.S. App. A-12, finding 5.8), the alleviation of racial imbalance in local school districts has been an expressly established policy of the state. The state, furthermore, has regularly enacted laws and promulgated regulations designed to give the policy practical effect.[23] Indeed, the Washington

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[22] *E.g.*, Wash. Rev. Code Ann. § 28A.02.050 (Cum. Supp. 1981) (incorporating into state educational code state prohibition of employment discrimination); Wash. Rev. Code Ann. § 28A.58.701 (Cum. Supp. 1981) (prohibiting discrimination in the granting of student aid); Wash. Rev. Code Ann. § 28A.87.220 (Cum. Supp. 1981) (incorporating into state education code state provision of criminal penalties for violations of civil rights). Cf. Wash. Op. Att'y Gen. No. 1, at 11 (1975) (state superintendent of public instruction authorized by state law to require local school districts to formulate and implement affirmative action requirements). See also Wash. Rev. Code Ann. § 28A.85.020 (Cum. Supp. 1981) (state superintendent of public instruction directed to develop statewide regulations and guidelines for the elimination of sex discrimination).

[23] See, *e.g.*, Wash. Rev. Code Ann. § 28A.58.245 (Cum. Supp. 1981) directing state superintendent of public instruction to develop rules and regulations for the implementation of inter-district, voluntary programs deemed necessary by the superintendent to improve racial balance within and among school districts) (enacted 1969); Wash. Rev. Code Ann. § 28A.41.250 (Cum. Supp. 1981) (directing the state superintendent to devise a statewide plan to assist school districts in developing programs for the relief of children suffering from racial isolation) (enacted 1974); Wash. Admin. Code 180-30-040 (conditioning approval of construction grants to school districts on a

Supreme Court has held that in implementing a local racial balancing plan, a school district is simply "effectuating, at the local level, a policy announced by the legislature." *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 448, 495 P.2d 657, 660 (1972).[24]

In this context, it is simply incorrect to speak, as did the court of appeals, of "a state-wide majority * * * usurp[ing] traditional local authority over local school board educational policies" (J.S. App. B-7), or to characterize as "paramount" any local interest in the promulgation of educational policy (*id.* at B-11). Indeed, in litigation challenging a 1971 mandatory nonneighborhood racial balancing plan implemented in the Seattle School District's middle grades, the State Supreme Court held that local referendums may not be used to overturn local desegregation plans because local voters may not "interfere in the management of the state's school system." *Citizens Against Mandatory Bussing* v. *Palmason*, *supra*, 80 Wash. 2d at 450.[25] The limitation on the use of mandatory measures for achieving racial balance contained in Initiative 350 does not restructure the educational policymaking process of the state of Washington in some unusual or special fashion. Unlike the situation in *Lee* v. *Nyquist*, *supra*, Initiative 350 does not represent a "single exception" (318 F. Supp. at 718) to the other-

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determination by the state superintendent that the proposed construction would not create or aggravate racial imbalance within the districts) (promulgated 1969).

[24] The state, moreover, has often indicated in some detail how this statewide policy is to be implemented by local districts. It has, for example, defined the degree of racial imbalance that local school districts should attempt to eliminate, and has required that local racial balancing plans be submitted to the state for approval prior to implementation. See, *e.g.*, *Citizens Against Mandatory Bussing* v. *Palmason*, *supra*, 80 Wash. 2d at 449 n.5, 495 P.2d at 661; Wash. Op. Att'y. Gen. No. 55, Part III (1965-1966) (conditioning state financing of racial balancing plans on approval by the state superintendent of public instruction).

[25] As Judge Wright noted in dissent, "[i]t is ironic that a federal court would now hold that the state itself may not interfere in its own school system" (J.S. App. B-24).

wise broad authority of local districts over educational matters. In Washington, statewide limitations on the exercise of local discretion are the norm. The court of appeals erred in concluding otherwise.

b. The court of appeals also erred in concluding that Initiative 350 burdens racial minorities by impermissibly restricting the capability of local school districts to promote racial balance (J.S. App. B-11). In contrast to the situation in *Lee* v. *Nyquist*, *supra*, where the statute clearly prohibited "all efforts to achieve racial balance" (318 F. Supp. at 715), Initiative 350 is not designed to prevent increased racial mixing in public schools. The Initiative does not prohibit all mandatory student assignments for racial reasons, but merely limits such mandatory assignments to those schools nearest or next nearest to the student's home. In addition, the Initiative does not limit in any manner the use of voluntary programs or school closures designed to promote racial balance. In short, the Initiative does not deny any student the right to attend a fully integrated school.

The Initiative, moreover, will not interfere with the efforts of individual school districts to eliminate de jure segregation. Unlike the statute in *Lee* v. *Nyquist*, *supra*, which blocked desegregation efforts even by "a school district subject to a pre-existing order to eliminate segregation in its schools" (318 F. Supp. at 715), Initiative 350 clearly permits Washington school districts to make racially conscious student assignments pursuant to a court finding of unconstitutional segregation.[26] Cf. *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971) (anti-busing law unconstitutional because it would "obstruct the remedies granted by the District Court" to eliminate existing de jure segregation).[27] The

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[26] The Initiative expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981).

[27] The statute at issue in *Lee* v. *Nyquist*, *supra*, clearly violated the rule established in *North Carolina Board of Education* v. *Swann*, *supra*, as it unambiguously blocked all efforts to dismantle de jure

Initiative, furthermore, has been consistently interpreted by the State Attorney General—the official charged with enforcing the Initiative—as permitting local officials to make race-conscious student assignments to remedy de jure segregation (App. Br. 37-39).[28] Initiative 350,

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segregation and therefore "operate[d] to * * * impede the disestablishing of a dual school system" (402 U.S. at 45). This Court's summary affirmance of *Lee* was announced approximately two weeks after the Court's decision in *Swann*. *Nyquist* v. *Lee*, 402 U.S. 935 (1971). Since the *Swann* decision fully justified the summary affirmance in *Lee*, it is implausible to attribute any novel, unexpressed further significance to that summary disposition. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance does not constitute an endorsement of the lower court's reasoning); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger C.J., concurring) (same). Accordingly, this Court's summary affirmance in *Lee* provided no support for the court of appeals' decision here.

[28] In the absence of a state court decision construing Initiative 350, the state Attorney General's interpretation is the most authoritative available construction of the Initiative. Although this interpretation is not "binding on the courts and legislature of the State," this Court has assumed that representations of the Attorney General of the State of Washington "are authoritative within [the state's] executive branch." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 694 (1979). Inasmuch as it is the state's executive branch that would enforce Initiative 350, the attorney general's representation that the Initiative would not be enforced in such a manner as to prevent dismantling of de jure segregation (if any exists in Washington and cannot adequately be remedied by other means) is entitled to substantial deference. Absent a state court interpretation, the Washington Attorney General's interpretation clearly prevails over that of the district court. See, *e.g.*, *Lynch* v. *Overholser*, 369 U.S. 705, 710-711 (1962).

Moreover, even if the district court's interpretation of Initiative 350 were correct, no decision of this Court holds that a state is constitutionally prohibited from requiring that the threshold legal question—whether existing racial segregation in the district is unconstitutional—be *judicially* decided before it permits local school

therefore, does not hinder the ability of school districts or school officials within the State of Washington to conform their conduct fully to federal constitutional requirements. The courts below erred in concluding otherwise.

c. Moreover, Initiative 350, unlike the challenged enactment in *Hunter* v. *Erickson*, *supra*, does not subject any future school attendance zone referendum sought by racial groups or other minorities to procedures more burdensome than those that were applicable to Initiative 350 or that currently apply to any other issue to be brought before the voters of Washington. The constitutional vice in *Hunter* v. *Erickson* was not that the Akron voters utilized a referendum to repeal a fair housing law (393 U.S. at 390 n.5), but that the resulting amendment to the city charter erected a special political obstacle to block all future fair housing ordinances (*id.* at 391). The city charter amendment challenged in *Hunter* required approval of all fair housing ordinances at a regular general election, but did not require such approval for any other category of municipal ordinance; it therefore was not "grounded in neutral principle" (*id.*

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boards (the subordinate political subdivisions created by the state to implement state educational policy) to depart from the statewide neighborhood school policy and to employ remedial race-conscious student assignments. See *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978); cf. *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches"); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (Warren, C.J., announcing judgment), 256-257 (Frankfurter, J., concurring), 268 (1957) (Clark, J., dissenting).

at 395) (Harlan, J., concurring). In contrast, Initiative 350 erects no political obstacles to future modification of state school attendance zone policy, and is the result of a procedure "which is grounded in neutral principle, * * * a general referendum" (393 U.S. at 395) (Harlan, J., concurring).

In enacting Initiative 350, the State of Washington plainly did not create a special political process for the consideration of racial issues. All the state did was enact what in Washington is commonplace—a statewide limitation on the discretion of local school officials. The fact that the state's voters utilized a general referendum as the means of effectuating this state educational policy is also unexceptionable, as "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James* v. *Valtierra*, 402 U.S. 137, 141 (1971). If local school districts and other groups oppose Initiative 350, the same general referendum procedure is available to them on exactly the same terms as it was to the proponents of Initiative 350. General referendums "do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage [minority] political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If * * * [pro-minority] legislation [is] defeated at a referendum [minorities] * * * undoubtedly lose an important political battle, but they [are] not thereby * * * denied equal protection." *Hunter* v. *Erickson*, *supra*, 393 U.S. at 394 (Harlan, J., concurring).

In *James* v. *Valtierra*, *supra*, 402 U.S. at 139, the Court declined to extend *Hunter* v. *Erickson*, *supra*, to cover an important political battle lost by proponents of low-cost public housing. In *James*, this Court rejected the claim that a newly adopted California state constitutional amendment denied proponents of low-cost public housing equal protection, even though the amendment required referendum approval of all such housing projects developed or acquired by a state public body. Although the mandatory referendum requirement undoubtedly hindered the efforts of those seeking low-rent public

housing (402 U.S. at 12), a referendum requirement was not considered to be a "special burden" within the meaning of *Hunter* v. *Erickson*, and the court therefore declined to find that it constituted a denial of equal protection.

As in *James*, the supporters of mandatory nonneighborhood student assignments in Washington must overcome the results of a public referendum to achieve their goals. But this "disadvantage[]" (402 U.S. at 142) does not deny equal protection because supporters of mandatory nonneighborhood student assignments have not been singled out and subjected to a referendum process "while no other group must face that obstacle" (*ibid.*).[29] Washington long has utilized a referendum process for many issues of general public concern.[30] "This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws'" (*James*, *supra*, 402 U.S. at 143).

Sensing that the state's utilization of a non-discriminatory referendum to establish educational policy does not by itself impose any special burden upon minorities within the governmental process, the court of appeals reasoned that the statewide nature of the referendum process violated the Fourteenth Amendment by "effectively

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[29] In *James*, the Court noted that California required referendums for approval of state constitutional amendments, issuance of general obligation bonds by local governments, and certain municipal annexations (402 U.S. at 142).

[30] The initiative and referendum process is widely used in Washington to enact law and shape public policy. See J.S. App. B-27; Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 Wash. L. Rev. 175, 179 n.29 (1979). The voters of the state may enact by means of an initiative any law that could be adopted by the state legislature (Wash. Const. Art. II, § 1). Once passed by the electorate, an initiative cannot be repealed by the state legislature for two years, although it can be amended by a two-thirds majority vote of both houses of the state legislature (*id.* at § 41). After two years, the initiative may be amended or repealed by the legislature in the same manner as any other statute (*ibid.*).

disenfranchis[ing] the voters of the local school districts with respect to local educational matters" (J.S. App. B-11). Aside from the fact that this "disenfranchisement" rationale overlooks the reality (noted by Judge Wright in dissent) "that 60% of the voters in Seattle voted in favor of the initiative" (J.S. App. B-24), the preceding discussion of state law shows that local voters in Washington have no more than a rescindable delegation of power from the state to affect educational policy in those few areas left to local discretion. Once the state has prescribed a uniform educational policy, local preferences entirely give way. Initiative 350, like other state-promulgated educational policies, restricts and directs local efforts to shape the character of local schools. But the resulting restriction or "disenfranchisement" of local voters stems not from Initiative 350, but from the state constitution. Thus, the "burden" placed upon local voters by the educational policy embodied in Initiative 350 is indistinguishable from the burdens imposed upon other groups by countless other restrictive state educational policies. The restriction imposed by the Initiative, therefore, unlike the restriction at issue in *Hunter* cannot accurately be characterized as unusual or special.

The effect of Initiative 350 is to restrict the discretion of local school boards to assign students beyond the nearest or next nearest school to their homes. Where student assignment was once a matter left to local discretion, it is now a matter of uniform state policy. But not only was this modification of state policy not the result of any unusual political procedure, the current state policy is not insulated from reconsideration or modification by a special political barrier. Initiative 350, at most, merely redistributes among governmental units the authority to assign students to schools in local jurisdictions, without making any change in the method for obtaining yet another reallocation of that authority. It places no "burdens on racial minorities within the governmental process" that are in any sense "special" (*Hunter* v. *Erickson, supra,* 393 U.S. at 391). In these

circumstances, the court of appeals erred in concluding that the Initiative impermissibly infringes appellees' Fourteenth Amendment rights.

III. Initiative 350 Represents a Constitutionally Permissible Policy Decision. The Fact that the State, Rather Than the Local School District, Made the Final Policy Selection is of no Federal Constitutional Significance

Apart from the preceding analysis, there is another fundamental reason why Initiative 350 does not violate the proscription of the Equal Protection Clause. Initiative 350 merely rescinds an educational policy that is not itself required by the Constitution, and replaces it with another constitutionally permissible policy. The only real question presented by the case, therefore, is whether the state can adopt a policy favoring neighborhood schools which supersedes the contrary policy of some of its constituent local school districts. The United States submits that it can.

The race-conscious nonneighborhood student assignment plan adopted by the Seattle School District reflects the district's judgment that "in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). But, regardless of whether utilization of that plan is within the district's "broad power to formulate and implement educational policy" (*ibid.*), it clearly is not mandated by the Fourteenth Amendment. "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole" (*id.* at 24). Similarly, because there has been no finding of unlawful segregation in Washington schools, and in Seattle in particular, Initiative 350's policy favoring neighborhood schools is well within the range of constitutionally permissible policy choices available to

the district.[31] The question thus becomes whether Washington's replacement of a racial balancing plan with a constitutionally permissible policy somehow offends the Equal Protection Clause.

This Court has long recognized that "mere repeal" of existing ordinances or legislation dealing with racial matters does not, by itself, offend the Equal Protection Clause. *Hunter* v. *Erickson*, *supra*, 393 U.S. at 390 n.5. Absent a preexisting constitutional duty (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 414 (1977))[32] or conduct on the part of the state that "significantly encourage[s] and involve[s] the State in private discriminations" (*Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967)),[33] the Fourteenth Amendment does not establish "an automatic constitutional barrier to the repeal

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[31] "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 28.

[32] In *Dayton Board of Education* v. *Brinkman*, *supra*, this Court concluded that whether a school board's rescission of prior resolutions calling for remedial racial balancing measures violated the Fourteenth Amendment was "inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. [Citations omitted.] * * * If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 433 U.S. at 414 (quoting *Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974)).

[33] In *Reitman* v. *Mulkey*, *supra*, this Court affirmed the holding of the California Supreme Court that a recent amendment to the state constitution guaranteeing a private right to discriminate in the sale or rental of real property violated the Equal Protection Clause. Central to this Court's opinion was a finding by the California Supreme Court that the state constitutional amendment "significantly encourage[d] and involve[d] the state in private discriminations" (387 U.S. at 381). The Court specifically noted that the Fourteenth Amendment would not invalidate mere repeal "of an existing law prohibiting racial discriminations in housing," nor would it prevent a state from putting "in statutory form an existing policy of neutrality with respect to private discriminations" (*id.* at 376).

of an existing law" impacting on racial issues (*id.* at 376). Analyzed under these principles, is it clear that adoption of Initiative 350 does not offend the Equal Protection Clause.

No court—state or federal—has ever determined that any Washington school district has been guilty of unlawful segregation. On the contrary, the record in this case demonstrates that the Seattle School District, as well as the other two plaintiff districts, have consistently and diligently sought to promote not merely racial integration but racial balance within their schools (see notes 2, 4, 5, 6, 14, *supra*). None of the plaintiff school districts, therefore, is constitutionally compelled to adopt racial balancing techniques (*Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at 414, 420). Nor is any of them precluded from adopting a neighborhood school policy, such as the one embodied in Initiative 350, since there has been no finding that such a policy by itself will significantly encourage and promote unlawful segregation. Cf. *Reitman* v. *Mulkey*, *supra*, 387 U.S. at 381. See also *Austin Independent School District* v. *United States*, *supra*, 429 U.S. at 994 (Powell, J., concurring). The Equal Protection Clause, therefore, places no significant constraints on the state's adoption of the educational policy option at issue in this litigation—neighborhood schools.

The court of appeals recognized the limited impact of the Equal Protection Clause in this case when it acknowledged that "we would be faced with a quite different issue" (J.S. App. B-10 n.8) had the school districts themselves rescinded their mandatory plans in favor of neighborhood schools. The court realized that the constitutionality of a neighborhood school policy in those circumstances would hinge upon whether the school districts were under a preexisting duty to dismantle a dual school system (*ibid.*). But although the court concluded the school districts could adopt a neighborhood school policy absent de jure segregation (*ibid.*), it nevertheless held that such a policy could not be imposed upon the districts by a superior decisionmaking authority—the state elector-

ate (*id.* at B-11). The court of appeals clearly erred in reaching this conclusion.

This case does not involve constitutionally proscribed racial discrimination, because there has been none. At issue, rather, is whether the State may adopt a policy that the court of appeals acknowledges the school board could have adopted. Thus, how the State of Washington distributes its governmental authority concerning school matters among the various components that comprise state government controls the disposition of this case, for in the absence of a constitutional violation, decisions concerning the public schools of the State of Washington lie entirely within the prerogative of the State.[34] Furthermore, how the state's decisionmaking authority is allocated among the various units of state government is a question for state, not federal, law.

The court of appeals' conclusion that the state is somehow disabled from establishing a student assignment policy ignores the state's constitutional obligation to provide "a basic program of education in a 'general and uniform *system of public schools*' " (*Seattle School District No. 1* v. *Washington*, *supra*, 90 Wash. 2d at 499, 522, 585 P.2d at 85 (emphasis added)). Under Article IX, section 1 of the state constitution,[35] Washington has full authority to establish and define educational policy for its public school system.

The appellee school districts apparently contend, and the court of appeals agreed (J.S. App. B-11), that Initiative 350 impermissibly constricts their discretion in student assignment matters. However, the "discretion" the districts claim the Initiative infringes existed merely because the state chose to delegate that discretion to the districts. Indeed, instead of permitting local districts

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[34] "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 16.

[35] "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex" (Wash. Const. Art. IX, § 1).

broad discretion in assigning students to schools, the state could have initially required that all students be assigned to the nearest or next nearest school to their homes. The state could subsequently have granted local districts the limited discretion to deviate from this policy if required for reasons of health, safety, unfit conditions, or the particularized needs of individual students. While this procedure would be viewed as expansion rather than contraction of local discretion, the end result is the same as that achieved by Initiative 350. Thus, the school districts' complaint that Initiative 350 unduly constricts their authority is unavailing. Whether a neighborhood school policy is achieved by expanding or restricting local discretion, and whatever the time sequence in which the expansion or restriction is accomplished, the respective rights of the state and local districts remain the same. The power of the state to order its internal govermental processes is unquestionable; the local districts cannot claim they possess authority superior to the state that created them. States have "extraordinarily wide latitude * * * in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978). And nothing in *Hunter* v. *Erickson*, *supra*, or in any federal constitutional principle restricts the state to a choice of either delegating every aspect of student assignment policy to local discretion or retaining every aspect for its own decisionmaking. *Hunter* cannot properly be extended to intrude so deeply into the ability of the states to order the division of government responsibilities between local and statewide authorities.

The court of appeals accordingly erred in concluding that the state was prohibited by the federal constitution from preempting the educational policy decisions of a subordinate unit of state government. In the words of Mr. Justice Cardozo, a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Mayor and City Council of Bal-*

timore, 289 U.S. 36, 40 (1933).[36] Under the state constitution, the state has full authority to weigh and decide between the competing policies of neighborhood schools and homogeneous racial balance. Whether or not the schools of the State of Washington will have finely tuned racial homogeneity or a neighborhood identity, or some combination of both, remains a question for ultimate resolution by the state. So long as the state avoids the dual school system proscription of the Fourteenth Amendment, it remains free to make the tradeoff choices between the advantages and disadvantages of neighborhood schools on the one hand, and extensive mandatory busing on the other.[37]

IV. The Other Grounds Relied Upon By The District Court Do Not Support The Conclusion That Initiative 350 Is Unconstitutional

Because the court of appeals majority determined that Initiative 350 creates a presumptively invalid racial classification, it did not reach the alternative grounds relied upon by the district court to find the Initiative unconstitutional: that it was motivated by an intent to discriminate against racial minorities and is imper-

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[36] See also *Newark* v. *New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers * * *"); *Barnes* v. *District of Columbia*, 91 U.S. 540, 544-545 (1875) (A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However, great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will).

[37] As Judge Wright noted in dissent, "[i]n the absence of a duty to desegregate, I find no constitutional barrier to the voters' adoption of a neighborhood schools policy. Although the choice made by the voters may have been controversial it was not one they were precluded from making" (J.S. App. B-18).

missibly overbroad. Although this Court need not address these grounds not considered by the court of appeals, *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 23-27; *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971), they do not in any event support a finding that Initiative 350 is unconstitutional.[38]

1. The district court found that Initiative 350 is unconstitutional because invidious discrimination "was at least one motivating factor" in its adoption (J.S. App. A-35). In reaching this conclusion, the district court relied on the multiple-factor analysis set forth by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-268 (1977). Upon examination, however, the factors set forth in *Arlington Heights* do not support the conclusion that Initiative 350 is animated by an invidious intent.

The district court's intent analysis purportedly probed the impact of the Initiative, its historical background, the specific sequence of events leading to its enactment, and any departures from substantive or procedural norms that occurred in the process. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-268. The district court first reasoned that Initiative 350 would have a racially disproportionate impact simply because it mandated a neighborhood school policy. The state's voters "were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students.

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[38] If, as we have argued (Point I, *supra*), Initiative 350 does not establish a racial classification, the intent issue becomes critical to the ultimate resolution of the case. See, *e.g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. 256. Some guidance on the intent issue from this Court, therefore, would be appropriate even though it was not addressed by the court of appeals. See, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). See also note 20, *supra*; *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979).

Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students" (J.S. App. A-33). The court next found that the historical background and specific events leading up to the Initiative's adoption supported an inference of discriminatory intent "inasmuch as it was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments" (*id.* at A-34). The court finally held that adoption of Initiative 350 was a "marked departure from the procedural norm" and a "clear[] * * * departure from prior state practice" in that "an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative * * *" (*id.* at A-35). All these factors, the court wrote, led to the conclusion that "a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative" (*ibid.*).

Contrary to the conclusion of the district court, however, these factors do not support an inference of discriminatory intent. At most, they evidence that the voters of Washington made an informed policy choice that "may have been controversial" but was "not one they were precluded from making" (J.S. App. B-18) (Wright, J., dissenting).

Although termination of mandatory nonneighborhood student transfers may result, as the district court noted, in some increased racial isolation due to residential patterns, this "impact" of a neighborhood school policy has never been found sufficient in itself to invalidate such a policy on equal protection grounds.[39] See, *e.g.*, *Austin In-*

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[39] Furthermore, the district court's assumption that racial imbalance inevitably impacts minority student education adversely is far from a "certainty" (J.S. App. B-26) (Wright, J., dissenting). "The underlying sociological and political assumptions equating quality education with integration have been questioned" (*id.* at

dependent School District v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., joined by the Chief Justice and Rehnquist, J., concurring); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *Diaz* v. *San Jose Unified School District*, 612 F.2d 411, 415 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"). The racially disproportionate impact of governmental action, moreover, is a reliable indication of discriminatory intent only when it is shown that the impact was not only anticipated but desired—that is, "that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 & n.25. See also *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464-465 (1979).

There is no evidence in this record that a racially disproportionate impact was either anticipated or desired by the supporters of Initiative 350. Indeed, Initiative 350 itself is grounded in the race-neutral belief that neighborhood schools promote the overall health of the public school system and benefit minority and nonminority students alike (see note 18, *supra*). Moreover, the suggestion that Initiative 350 would have a discriminatory impact was vigorously disputed by its supporters, who asserted to the contrary that mandatory noneighborhood busing would hasten an exodus of students to private schools, thus aggravating the public school system's existing racial imbalance and threatening the system's educational quality (note 10, *supra*). Supporters of the Initiative argued that implementation of a neighborhood school policy coupled with voluntary integration techniques

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B-25). See also N. St. John, *School Desegregation Outcomes for Children* 136 (1975); Bell, *Book Review*, 92 Harv. L. Rev. 1826 (1979); Armor, *The Evidence on Busing*, 28 Pub. Interest 90 (1972).

could both stem the exodus from public schools and racially balance the system in an educationally sound manner (*ibid.*). On this record, the district court did not and could not find that Initiative 350 was enacted at least in part *because* it would have a discriminatory impact on racial minorities. Thus, the "impact" noted by the district court is not probative of discriminatory intent. *Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 464-465; *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279.

The district court's analysis of the historical background and events leading to the enactment of Initiative 350 was extremely limited. The court focused on the fact that state voters adopted the Initiative in reaction to a mandatory nonneighborhood student assignment scheme, but failed to recognize that the state has never operated a segregated dual school system. Although there has been a history of opposition to nonneighborhood school assignments in the Seattle area (J.S. App. A-34), there is no evidence that the Seattle School District or any other district in the state has ever engaged in de jure segregation. On the contrary, the record in this case demonstrates continuing efforts by the State of Washington's school system to comply with the state constitutional requirement that an adequate education be provided to "all children residing within its borders, without distinction or preference on account of race, color, caste, or sex" (Wash. Const. Art. IX, § 1). See notes 2, 14, *supra*. The district court ignored the state's historic policy of nondiscrimination in its analysis of the motivation behind Initiative 350. See notes 22-24 and accompanying text, *supra*.

The district court correctly concluded that Initiative 350 was "conceived, drafted, advocated and adopted for the specific purpose" (J.S. App. A-34) of rescinding the Seattle School Board's decision to implement a race-conscious student assignment plan that involved transporting students beyond their neighborhood schools. But mere rescission of a racial balancing plan and consequent implementation of a neighborhood school policy does not evi-

dence invidious discrimination. Cf. *Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at 414. Indeed, even the court of appeals conceded that, absent preexisting de jure discrimination, the school districts themselves could choose to adopt a neighborhood school policy without violating the Equal Protection Clause (J.S. App. B-10 n.8). If the school districts could adopt such a policy consistently with the Fourteenth Amendment, there is no reason why a superior decisionmaking entity—the state electorate—could not similarly adopt such a policy, especially when the supporters of that policy, as found by the district court, "acted legally and responsibly in [their] advocacy of Initiative 350" (*id.* at A-22) and "took steps to avoid race becoming an issue in the campaign" (*id.* at A-23).

The final indicator of discriminatory intent noted by the district court—that Initiative 350 constituted a "marked departure from the procedural norm" (J.S. App. A-35) because state educational policy supplanted local policy—has almost no probative weight as evidence of racial animus. As has already been developed, state supervision of and intrusion upon local educational policy *is* the norm in Washington. Statewide initiatives and referendums, furthermore, are widely utilized on many issues of public importance. See note 30, *supra*. See also *James* v. *Valtierra*, *supra*, 402 U.S. at 141. The "state preemption of local autonomy" effected by Initiative 350 and noted by the district court is simply not "a departure from prior state practice" (J.S. App. A-35). It is thus not indicative of invidious intent.

In the final analysis, the district court's finding of discriminatory intent rests solely on its conclusion that Initiative 350 was "drafted, advocated and adopted for the specific purpose" (J.S. App. A-34) of rescinding a racial balancing plan involving mandatory nonneighborhood student transfers when the voters were "well aware" (*id.* at A-33) that the initiative would achieve precisely that result. The court concluded, in other words, that the voters of the state may not knowingly replace a system of racial balancing with a neighborhood school

policy without raising an inference of racial discrimination. The record in this case and the prior decisions of this Court do not support such an inference.

Contrary to the holding of the district court, the record of this case demonstrates that the supporters of Initiative 350 were not motivated by a desire to discriminate against minorities, but rather by a belief that school children and their parents derive substantial benefits from neighborhood schools, regardless of their racial makeup. Supporters of the Initiative believed that mandatory nonneighborhood assignments and busing of students to distant schools deprives both minority and nonminority parents and children of these benefits and, at least in the long run, exacerbates existing racial imbalance in the public schools (see note 10, *supra*).[40] The district court did not find, and there is no evidence in the record to indicate, that the assertion of the above views during the initiative campaign was insincere.[41]

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[40] Experience with mandatory nonneighborhood student assignment and busing plans in many school systems throughout the country indicates that this concern may be well-founded. Indeed, as three Justices of this Court have observed (*Estes* v. *Metropolitan Branches of the Dallas NAACP*, *supra*, 444 U.S. at 450 (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from dismissal of certiorari)):

> [P]ursuit of racial balance at any cost * * * is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems.

See also *id.* at 438 ("It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools").

[41] Aside from the district court's statement that it could "safely assume" (J.S. App. A-31) that a desire to discriminate against minorities motivated some persons to vote for the Initiative, there is nothing in the district court's findings or in the record to suggest that a belief in the benefits of neighborhood schools was either not held by supporters of the Initiative or was merely a pretense for an invidious desire to deny equal educational opportunity to minorities.

Nor are such views inherently suspect. Indeed, the district court expressly found (J.S. App. A-23):

> A neighborhood school policy has certain advantages in that it facilitates community and parental input and support for educational and extracurricular programs; it minimizes safety hazards to children in reaching school; it reduces the cost of transportation; it eases the task of student assignment through the use of easily determined standards; and it makes for better home-school communication[s].

Because these advantages of a neighborhood school assignment policy inure to the advantage of minority students and parents no less than to that of the majority race, the adoption of such a policy provides no basis in itself for an inference of racial animus. And, even if it is assumed that the racial balancing scheme that the neighborhood school policy replaced provided greater benefit to minority than to majority students, the mere fact of replacing one policy with the other shows nothing more than a tradeoff of one kind of advantage for another. The choice made by the voters of Washington is entirely consistent with a good faith belief that the advantages *for minorities* of the neighborhood school system outweigh the advantages for them of a racial balancing system (a preference reflected in the substantial support for neighborhood schools in the minority community itself.)[42] Because the district court made no findings inconsistent with such a belief on the part of the sponsors and adopters of the Initiative, its finding of discriminatory purpose is entirely without basis. Indeed, the fact that the Initiative imposes no barrier to voluntary transfers out of their neighborhood schools by those who disagree with the voters' policy judgment is a further indication that the Initiative reflects the voters'

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[42] Def. Exh. A-137 (an opinion poll of parents and guardians of children in Seattle public schools found that 65% of minority parents opposed mandatory nonneighborhood student transfers). See also Exh. A. 70-71 ("large numbers of minorities are opposed" to mandatory racial balancing).

effort to promote the best interests of all students, rather than a purpose to discriminate.

Nor is there evidence of racial animus in the fact that the Initiative may also reflect a policy that students should not needlessly be assigned to schools on the basis of race (*i.e.*, in the absence of a need to remedy de jure segregation). It is entirely consistent with our constitutional ideals for the voters of Washington to share the view that "[t]he time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove* v. *Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring). See also *id.* at 532 (Stewart, J., dissenting) ("* * * by making race a relevant criterion * * * in its own affairs the Government implicitly teaches * * * that people can, and perhaps should, view themselves and others in terms of their racial characteristics").

Far from ever intimating that a neighborhood school policy is necessarily motivated by a discriminatory purpose or is otherwise inherently discriminatory, this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 28, unanimously stated that "[a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest to their homes." See also *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., joined by the Chief Justice and Rehnquist, J., concurring). The district court's holding that Initiative 350 was motivated by a discriminatory purpose cannot be sustained unless the Court is now willing to conclude that, as a matter of law, where residential racial isolation exists a policy favoring neighborhood schools is necessarily motivated by a discriminatory purpose.

2. The district court found that Initiative 350 was "overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is de jure segregation * * *" (J.S. App. A-35). In so concluding, the district court erred in several fundamental respects.

In the first place, the district court never should have reached the overbreadth question, which arose only because that court improperly rejected the state Attorney General's interpretation of Initiative 350. The State has consistently taken the position that the Initiative cannot and will not be read to prohibit the use of non-neighborhood mandatory student assignments in the event that the use of such measures is constitutionally required to eliminate de jure segregation. The state Attorney General has averred that if a school district's use of such measures is constitutionally required, the state will not prosecute the district under the Initiative (App. Br. 37-39). The State has "insisted from the outset" that Initiative 350 permits dismantling of de jure segregation "without first having to seek an authorizing court order of some sort" (*id.* at 38-39). As noted earlier (note 28, *supra*), this interpretation of the Initiative by the state Attorney General is entitled to substantial deference. Furthermore, if the district court doubted the soundness of the Attorney General's interpretation of the Initiative, it could have obtained an authoritative resolution of the matter by certifying the question of the Initiative's construction to the State Supreme Court.[43] In the absence of a state court interpretation of Initiative 350, the district court's rejection of the Attorney Generals' interpretation in favor of what it deemed to be an invalidating construction of the Initiative was clearly erroneous. See, *e.g.*, *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Lynch* v. *Overholser*, 369 U.S. 705, 719-711 (1962).

Apart from the improper rejection of the state's interpretation of its own law, the district court erred in applying the overbreadth doctrine to a claim arising under the Fourteenth Amendment. This Court has applied the overbreadth doctrine in only the most unusual circumstances, and almost exclusively in cases involving First Amendment rights of expression or association. See,

[43] See Wash. Rev. Code Ann. §§ 2.60.010 to 2.60.090 (1970).

e.g., *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 624 (1980); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-616 (1973); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *United States* v. *Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Indeed, the Court now refers to the overbreadth doctrine as a doctrine of the First Amendment. *E.g.*, *Ulster County Court* v. *Allen*, 442 U.S. 140, 155 (1979); *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977). The district court's acceptance of the overbreadth challenge here extends the overbreadth doctrine past the confines of the First Amendment and into the expanse of the Equal Protection Clause, thus constituting a marked departure from the Court's traditional practice of according the doctrine an extremely narrow scope. See, *e.g.*, *Ulster County Court* v. *Allen*, *supra*, 442 U.S. at 154-163 (reversing a court of appeals decision to entertain an overbreadth challenge to a statutory presumption regarding illegal possession of firearms); *Bates* v. *State Bar*, *supra*, 433 U.S. at 380 (finding little, if any, justification for applying the doctrine to restrictions on commercial speech). See generally *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 613 (even in the First Amendment context, the facial overbreadth doctrine "is, manifestly, strong medicine"; "[i]t has been employed by the Court sparingly and only as a last resort").

Even assuming that the plaintiffs in this case were entitled to mount an overbreadth attack on Initiative 350,[44]

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[44] The plaintiff school districts in this action cannot argue that the Initiative impermissibly burdens their duty to remedy de jure racial imbalance because they maintain there is no such segregation in their districts. Rather, their contention is that, even assuming Initiative 350's limitation on mandatory student assignments may be constitutionally applied to themselves, the Initiative is nevertheless unconstitutional on its face because it will prevent other school districts from fulfilling their constitutional duty to eliminate de jure segregation. As this Court has repeatedly held, such challenges run counter to principles of standing "[e]mbedded

it is plain that the district court erred in its assessment of the attack's merit. This Court has established that to invalidate a statute on overbreadth grounds, "particularly where [as in this case] conduct and not merely speech is involved, * * * the overbreadth of a statute must *not only* be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 615. See, e.g., *Ohralik* v. *State Bar Association*, 436 U.S. 447, 462 n.20 (1978). The asserted overbreadth of Initiative 350 —that in mandating a neighborhood school policy it impedes efforts to eliminate de jure segregation—is neither *real nor* substantial.

The Initiative's potential for impeding elimination of de jure segregation can be "real" only if there are school districts in the state of Washington that are, and recognize that they are, unconstitutionally segregated. The district court made no such finding. Nor is there any evidence in the record to support such a finding. Given the State of Washington's tradition of nondiscrimination, the fact that the State has never operated a statutory dual school system, and the State's assertion, uncontradicted by the record and uncontested by the parties, that "no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools" (J.S. 4), any

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in the traditional rules governing constitutional adjudication." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 610. As a general rule, if there is no constitutional defect in the application of a statute to a litigant, the litigant does not have standing to argue, as the school districts have argued here, that the statute "would be unconstitutional if applied to third parties in hypothetical situations." *Ulster County Court* v. *Allen*, *supra*, 442 U.S. at 155; *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 610-611 ("These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws").

assumption that such school districts must exist has little justification.[45]

Initiative 350, furthermore, will not inhibit in any "substantial" fashion a school district's compliance with its constitutional duty to operate a unitary school system. Because the Initiative specifically provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools" (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981), if an action were brought against a school district for violating the Initiative's ban on nonneighborhood student transfers, a district that believed such action was constitutionally required would be entitled to assert its affirmative constitutional duty to dismantle de jure segregation as a defense. The Initiative, therefore, would not interfere with either the school districts' duty to conform its conduct to constitutional requirements or the courts' obligation to enforce the Constitution. *Cf. North Carolina Board of Education* v. *Swann, supra*, 402 U.S. at 44-46. Moreover, as already developed, the State has consistently maintained that the Initiative does not inhibit measures necessary to eliminate de jure segregation. See note 28, *supra*.

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[45] It would be pure speculation to assume further that, if such districts exist, their de jure racial imbalance is likely to be so substantial that the districts would be unable to effectively eliminate it within the constraints imposed by the Initiative. Cf. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977) (federal court must tailor the scope of a desegregation remedy to the "incremental segregative effect" of the constitutional violation); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 436-437 (1976). The Initiative does not prohibit the use of voluntary racial balancing measures. Nor does it prohibit the use of mandatory measures if imposed in a "nearest or next nearest" school context. The Initiative specifically provides that it in no way limits the authority of school districts to close school facilities. Wash. Rev. Code Ann. § 28A.26.030 (Cum. Supp. 1981). See also note 11, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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INTRODUCTION

This case involves a clash between school officials and the voters of the State of Washington on a critical issue of social policy.[1] But contrary to appellees contention, it does not involve as well a clash between the voters and the constitutional rights of its minority children, as should become clear to this Court.

We do not propose to show that the policy adopted by the voters in Initiative 350, which overrode that adopted by the school officials, was the wisest or even the preferable policy. Just as one can always argue whether the

[1]We use the broader term "social" rather than "educational" policy for the clash involves, as we shall see, fundamentally different views as to the proper role of an educational system.

voters' choice of a president, governor, or legislator is the preferable choice, so too here. Whether the voters' choice was the best or not is probably unresolvable. The relevant question is whether it was constitutionally theirs to make in the first place.

The policy question and the constitutional question, however, cannot be completely divorced. Indeed, an examination of the relationship between the two raises the principal issues upon which we focus in this reply, as we take up the various points made by the appellee school districts.

First, we examine the relationship between the issue of improper statutory classification (albeit covert as appellees now admit) and the issue of improper purpose, and ask in light of that examination: Are the two issues really separate? Is not the charge of an improper *covert* classification, analytically, the same as the charge of improper purpose? And more importantly, does not the *overt* classification which the Initiative actually makes belie the charge of improper purpose?

Admittedly, Initiative 350 was prompted by, and in that sense aimed at, the Seattle Plan. But what, in the voters' minds, was *wrong* with the Seattle Plan, as shown by the Initiative itself, and particularly by the classification that it makes? What *feature* of the Seattle Plan was it that prompted the Initiative? These questions bring the classification issue and the issue of improper purpose into focus and will show that they are not really distinct. In turn, they will provide no basis for invalidating the Initiative.

This first line of inquiry leads to the second: In what precise sense is the policy decision adopted through the Initiative "race conscious"? After all, the Initiative was proposed in response to another decision that was unquestionably "race conscious"; *i.e.*, the adoption of the Seattle Plan itself and the departure from the traditional neighborhood school assignment policy which it embodied. Does this unavoidable element of "race consciousness" in the adoption of the Initiative make it constitutionally impermissible for the voters?

Next, we ask: If the voters of the State cannot

override the policy decision made by the school officials involved in this litigation—and especially that made by the Seattle School District officials—is there *anyone* who can override that decision? Can those very same officials do so? And if they can, why cannot the voters themselves? By what constitutional analysis is this power to override given to the one group, and not to the other? This question is particularly important where, as here, the policy being rescinded was not itself constitutionally required in the first place.

There is another facet to this problem, best illustrated by the claim of Seattle School District. That claim, in essence, is that Initiative 350 is unconstitutional because it prevents the District from attaining the precise racial balance prescribed by the *specific percentages* established for Seattle. But what is it in the Fourteenth Amendment's Equal Protection Clause which provides that protection to these percentages? If they (or any percentages) are so protected, can the voters change them so as to require a lesser level of racial balance? More importantly, can even Seattle School District change them? Is the Fourteenth Amendment in effect a legal ratchet which allows changes in the percentages only in one direction, if by the voters, but in both directions if by the District itself? We will explore these questions as well.

Lastly we again examine the "overbreadth" issue to show that, viewed in its proper perspective (*i.e.*, from the perspective of the constitutional and statutory rights of school children) it is really a "non-issue," the resolution of which will only determine a constitutionally insignificant procedural issue; *i.e.*, who might bring the next possible round of litigation.

Before taking up these points, however, one question should be addressed at the outset: If the Initiative is upheld, what will be the effect on the education of minority children, so far as the record tells us?

For minority children in the Pasco School District,

the result will be that they are no longer bussed to the other end of the school district and are instead free to attend the two or three schools closest to their own neighborhood. At the same time *majority* children in Pasco, if the district determines to maintain *its* precise percentages, will, for the first time be required to ride the bus to the next nearest school. (See, App. Br. 16, and JA 53). Whether they would receive a better education there than that which they are receiving now is not known.

For minority children in the Tacoma School District, the result would be no change whatsoever. (See, App. Br. 17-18).

For minority children in the Seattle School District, the answer depends upon the decisions which the District and the students (and their parents) would make.

How close Seattle might come to its own definition within the limitations of the Initiative is impossible to determine, because the answer principally depends upon two factors: The success or lack thereof for the voluntary programs, and the District's own policies regarding school closures. Because of its declining enrollment, school closures are economically necessary, though politically difficult. (*Cf.*, FF 3.9).[2] Closing schools which would not meet the District's criteria for racial imbalance would obviously bring the District much closer than would closing those which do meet them.[3]

So much for the numbers—or lack thereof. What does all this mean in terms of the quality of education which would be received by minority students in Seattle if the Initiative were upheld?

No one really knows. But an indication may be found

[2]This stems, of course, from parents' strong belief in neighborhood schools, and can hardly be gainsayed. It comes from minority as well as majority parents. However, when some schools *must* be closed nevertheless, because of declining enrollments, the only question is *which* schools must be closed. And that choice is the District's, and will effect the degree of racial balancing.

[3]All of this is dependent upon one critical factor. Seattle presupposes that they are under an affirmative duty to meet that specific level of balance. We submit they were not, and are not now. That, of course, is the core question the Court must answer. (See pp. 13-17, *infra*)

in a report referred to, though not identified, in appellees' brief.[4] In August of last year, Seattle issued Report No. 81-6, entitled "The Effect of the Seattle Plan for School Desegregation[5] on Achievement Test Scores." The reason for the study covered in the report is states as follows:

> "One of the frequently asked questions is, 'What effect has desegregation had on student achievement?' *It should be remembered that the goal of the Seattle Plan was to eliminate racial imbalance; not to raise achievement levels.* Nevertheless, some concern has been expressed that desegregation might somehow *lower* achievement levels for some students. The report addresses this concern." (Emphasis supplied.)

The report concludes:

> "*The purpose of the Seattle Plan was to reduce racial imbalance in the schools. Achievement of that goal has demonstrated the Plan's success. Any effect of the Plan on achievement test scores is irrelevant to evaluation of the Seattle Plan itself.*" (Emphasis supplied)

This is hardly a ringing endorsement for the Seattle Plan as a means of attaining higher achievement levels, and falls considerably short of showing a significant correlation between levels of racial balance and levels of educational achievement.

But even more importantly, the report shows that the Seattle Plan embodies a particular educational—or rather social—policy: Racial balance must be achieved, even when not constitutionally required, simply as a matter of good social policy, completely independent of the actual results on educational achievement.[6]

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[4]See, SD Br., 14, note 15: "Test scores in Seattle have slightly improved." This 1981 report would appear to be the source for that statment.

[5]This term itself assumes a legal conclusion which is at the heart of this litigation. See discussion pp. 13-17, *infra*.

[6]One is reminded of Dean Derrick Bell's comment on Gary Orfield, who was one of the appellees' witnesses in this case: "But school integration for liberal campaigners like Orfield is too important to confuse with education." See, Bell, Book Review, 92 H.L.R. 1826, 1836 (1979) reviewing Orfield's "Must We Bus?"

This may indeed be sound social policy. The question, however, is whether it is to be embedded in the requirements of the Fourteenth Amendment.

The Seattle Plan, we should add, does not reject the values inherent in a neighborhood school policy; nor does the Initiative reject the values inherent in increased racial balance. The critical difference lies rather in the different weights each assigns to these competing values, and in the accommodation that they strike.

Thus, the Initiative allows mandatory assignments to the *next nearest* school, for the purpose of achieving racial balance, or for any other purpose. Similarly, decisions as to which schools should be closed and where new schools should be located will have a substantial impact upon the level of racial balance; and the Initiative does not control those decisions in any way. So too the Seattle Plan mandatorily assigns not just individual students, but "entire neighborhoods of students" away from their nearest or next nearest school. (FF 6.11, J.S. A-17) And as we have seen, one of the justifications for such mandatory assignments is the opposition to school closures from neighborhood groups which purportedly make school closures an impracticable tool for achieving racial balance. (See, FF3.9.)

We now turn to the legal issues.

I. INITIATIVE 350 DOES NOT EMBODY A RACIAL CLASSIFICATION NOR WAS IT ADOPTED FOR A DISCRIMINATORY PURPOSE.

A. *The Relationship Between the "Classification" Issue and the "Purpose" Issue.*

The reason for the school districts' efforts—so far successful—to establish that the Initiative embodies a racial classification is readily understandable. Once such a classification is found it is invariably fatal to the law or other governmental decision under attack. See, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hunter v.*

Erickson, 393 U.S. 385 (1969). In contrast, attacks grounded on a charge of racially discriminatory purpose have, in recent cases, failed. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metroplitan Housing Development Corp.*, 429 U.S. 252 (1977), *cf.*, *Personnel Administrator v. Feeney*, 442 US. 256 (1979).

Certain portions of the school districts' brief, however, raise the question: Are the two arguments really distinct? In arguing that the Initiative creates a racial classification, they state: "It [the Initiative] is race-conscious in its history and race-related in its *purpose* and *effect*." (SD Br. 18, emphasis supplied.) The Initiative's classification, it is argued, is "covert" (SD Br. 21), and must be judged on the basis of its "objective." (SD Br. 21). Similarly, under this same argument, the school districts emphasize "the potential for corruptive influence of prejudice." (SD Br. 24).

This suggests that the school districts' "classification" argument and its "purpose" argument are not really all that distinct—and indeed they are not. The search for a "covert" classification is really the search for an improper purpose.

We suggest that the focus instead be upon a somewhat different distinction which, though not altogether tidy, may be analytically more useful. That distinction would be between (1) governmental decisions which are *per se* violative of the Fourteenth Amendment regardless of motive and (2) those which are constitutionally permissible, in and of themselves, but may be invalidated because of the reasons or motives behind their adoption. *Brown v. Board of Education* and *Hunter v. Erickson* would illustrate the first category of cases; and *Washington v. Davis, Arlington Heights*, and *Feeney* the second.

When we say that the Initiative does not embody a racial classification we are saying only that it is a governmental decision which falls into the second category and not the first. More specifically, we are saying that a governmental decision to prohibit mandatory assignments

beyond the next nearest school except for reasons related to the individual needs of the student is, in and of itself, perfectly permissible. It is not off limites to the government's decision-making process. It is, in this respect, no different from a decision to give a veterans' preference in employment. (*cf., Feeney*) or to require minimum literacy requirements for applicants to a police force. (*Davis*). But just as in *Feeney* and *Davis*, so too here a racially discriminatory purpose may invalidate that decision. And whether one couches the legal result in those terms, or in terms of a "covert" classification, is really beside the point.

This is perhaps best illustrated by comparing *Hunter v. Erickson, supra*, with *James v. Valtierra*, 402 U.S. 137 (1971). In *Valtierra*, it will be recalled, the lower court had invalidated, on the basis of *Hunter*, an amendment to the California constitution requiring local voter approval for any low-rent public housing project. In reversing, this Court stated: "The present case could be affirmed only by extending Hunter, and this we decline to do." 402 U.S. at 141.

The Court did not engage in a search for a "covert" classification or attempt to determine whether the classification actually made by the amendment, though nonracial in "form," was racial in "substance." (*Cf.*, SD Br. 21). Rather, it went directly to the question of whether the amendment was "aimed at a racial minority," *i.e.*, the question of discriminatory purpose.

The Court should take the identical approach here.

B. *The Fact that the Initiative was Prompted by the Seattle Plan Does not Show a Racially Discriminatory Purpose.*

The school districts' principal contention as to racially discriminatory purpose, however phrased, really sifts down to a single assertion: The Initiative was intended to impede the Seattle Plan, and any other plan which relied upon mandatory extra-neighborhood student assignments to achieve racial balance. Indeed, this effect

on the Seattle Plan was the basis for the District Court's finding that a discriminatory purpose existed. (See, J.S. A-24).

But this overlooks the critical question: Is the objectionable feature of such plans that they achieve greater racial balance than would exist without them? Or is it that they mandatorily assign students outside their neighborhoods, without any justification in terms of the specific needs of specific students?

The classification established by the Initiative itself provides a large part of the answer. It shows that the objectionable feature was not the former but the latter. This is shown by the fact that the scope of the Initiative is not limited to plans for attaining racial balance, such as the Seattle Plan, but covers *all* extra-neighborhood mandatory assignments, for whatever reason, unless they can be justified in terms of specific needs of specific students.[7]

The Initiative no more evidences an intent to discriminate than did the constitutional amendment involved in *Valtierra*, the test for police force applicants involved in *Davis*, the zoning decision in *Arlington Heights*, or the veterans' preference provision involved in *Feeney*. And the burden of showing such an intent remains with the appellee school districts, just as it remained with the plaintiffs in those four cases. They simply have not met that burden.

In attempting to meet that burden, the school districts also face a major factual hurdle: In the campaign for Initiative 350 the Initiative's sponsors made no appeals to racial bias, and in fact deliberately took steps to avoid race becoming an issue. (FF 7.27, 7.29, J.S. A-23). Indeed, as we earlier pointed out, advertising and public relations witnesses called by both sides gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would *lose* support in Washington if designed

[7]Compare FF 8.3 and 8.8 (JS A-24) and the District Court's use of the qualifiers "most," "major" (FF 8.3) and "almost all" (FF 8.8). That bussing of students for purposes other than racial balance was taking place in Washington, which *would be precluded* by the Initiative, was demonstrated in the record, as the District Court acknowledged. See JS 18, St. Br. 10, N. 6.

to appeal to segregative and racist attitudes. (Tr., pp. 496-98, 505-06, 509-11, 538; JA 21, 26; Ex. 2)

This does not mean that some of the voters were not influenced by racial bias. It does show, however, that such bias was in no way a decisive factor in the Initiative's success.[8] Indeed, the converse *is* shown; lack of bias was the decisive factor. And it further shows what should be obvious from the Initiative itself, and from any balanced view of the record. To the extent that the voters considered race at all, they decided that any benefits from increased racial balance stemming from extra-neighborhood school assignments were outweighed by the benefits of a policy allowing the choice of one's neighborhood school.

The school districts simply suggest that the Initiative is nevertheless invalid because it was "race conscious." Certainly, because it was developed as a response to the Seattle Plan *which was itself "race conscious"* a corresponding element of race-consciousness was inevitable. But this factor should no more invalidate the Initiative than it should invalidate the Seattle Plan itself. The critical question is the role which this race-consciousness played in the decision-making process. Did it lead to the adoption of the Initiative for a discriminatory purpose? As we have seen, it did not. And the school districts' efforts to equate race consciousness with discriminatory purpose only confuse the issues, by substituting "buzz" words for legal analysis.

C. *If the State Cannot Limit Extra-neighborhood Student Assignments, who can? The Issues of State Control Versus Local Control and State Intrusion into Local Affairs.*

The issue of discriminatory purpose is next examined from another aspect. Under the opinion of the Court of Appeals, Seattle could completely dismantle its own plan, and revert back to its prior policy of a neighborhood school

[8]As Justice Stevens has reminded us: "A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington v. Davis*, 426 U.S. at 253.

system, at least absent any prior de jure segregation. J.S. App. B-10. And on this point, the Court of Appeals was correctly following this Court's opinion in *Dayton v. Board of Education v. Brinkman*, 433 U.S. 406 at 414 (1977).

But if the arguments of the school districts on the issue of discriminatory purpose are correct, then the Court of Appeals (along with this Court in *Dayton*) was incorrect, and Seattle would be forever precluded from dismantling its plan, even though it had no constitutional obligation to adopt it in the first place. For if Initiative 350 was discriminatory in purpose *only* because it embodied a decision to undo the racial balance brought about by the Seattle Plan, the same decision, with the same effect, must also be discriminatory when made by the school board members themselves, rather than the voters.

Similarly, if the Initiative is unconstitutional because it deprives minority groups of educational benefits stemming from increased racial balance brought about by the Plan, then it should also be unconstitutional for the school board to do the same thing. If it is discriminatory for the voters to change the accommodation between neighborhood schools and racial balance struck by the Seattle Plan by assigning more importance to neighborhood schools, it should be discriminatory for the school board to do so as well. The school districts' arguments as to discriminatory purpose, in short, prove too much. They permanently would lock in *all* efforts to achieve racial balance even where not constitutionally required in the first place. This Court, however, has never given such an effect to the Fourteenth Amendment and, as pointed out by the Court of Appeals, has indicated in *Dayton* that it has no such effect.

And quite wisely so, in our view. If efforts to achieve greater racial balance were constitutionally irreversible, that would be a great disincentive to undertake such efforts in the first place.[9]

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[9]Not only would efforts to achieve racial balance in schools be impeded, but governmental efforts to promote those programs generally described as "affirmative action" would logically be irreversible as well, and for that reason similarly impeded.

There is, to be sure, a further argument offered by the school districts which does not have this boomerang effect. For it involves a theory which would, if accepted, invalidate Initiative 350 without also prohibiting Seattle itself from adopting the same policy as that embodied in the Initiative. The argument is that the Initiative skews the political process in the same manner as it was skewed in *Hunter*. But let us see if this parallel really exists.

The constitutional violation in *Hunter* was not that the Akron open housing ordinance was repealed. Clearly the Akron city council could have repealed it without violating the Fourteenth Amendment, and so could the voters themselves, through the referendum process (393 U.S. 390, note 5). The constitutional violation rather involved the procedures for restoring that ordinance. Those procedures established a "gauntlet," i.e., the necessity of an automatic referendum to the voters, which no other ordinances relating to housing—and indeed, no other types of ordinances at all—had to run. (393 U.S. at 390, 391)

The school districts contend that the Initiative has created a similar gauntlet which must be run only by the proponents of extra-neighborhood mandatory assignments for racial balance.

We have already touched upon one reason why it does not. The proponents of extra-neighborhood mandatory assignments for several reasons must now, under the Initiative, convince the legislature or the voters of the merits of their cause, unless the reason can be found as an exception within the Initiative justified in terms of specific needs of specific students.

The parallel fails for two additional reasons. The opponents of the Seattle Plan simply did not have available to them a local referendum procedure similar to that available in Akron. The only choice they had in presenting their case to the voters was the choice they actually made—a statewide initiative.[10] They changed the locus of the decision-making process from the local to the state level because State law made that their only choice.

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[10]*Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445 at 449, 495 P.2d 657 (1972).

Consider the supposed parallel next from the point of view of the proponents of extra-neighborhood mandatory assignments, rather than that of the opponents. It is not just minority groups that must make their case on the state level in order to bring about what they perceive to be educational improvements. (See generally, State Br. 21, 22; U.S. Br. 21-24.) If any group, minority or not, wishes major curriculum changes, they must change state law. See Wash. Rev. Code § 28A.58.754. If they want lower ratios of students to classroom teachers, or if they believe those teachers are inadequate because they are underpaid, they must look to the legislature. (See §§ 87-91, chapter 340, Laws of 1981, establishing funding levels in terms of salary levels and student-staff ratios.) Likewise, they must look to the legislature if they wish to assure more hours of instruction for their children.

What we are saying, quite simply, is that because of the State's constitutional "paramount duty" in the field of education, broad state control over the decisions of local school boards is the norm, not the exception. And for this reason, as well, the parallel with the situation in *Hunter v. Erickson* does not exist.

II. ***The Initiative Does Not "Resegregate" Any school District in the State of Washington.***

At page 2 of the Brief of Appellees, the school districts make the following statement which they characterize as part of the "historical background" of this case:

> "The Seattle, Tacoma, and Pasco * * * districts have determined that racial *desegregation* is an important educational goal. The overall education of students * * * suffers when schools are *segregated*, * * * The greater the *racial imbalance*, the greater the impairment. * * * Since the early 1960's, these public school districts have taken steps to reduce school *segregation*. * * * "Because the antibusing statute in question arose mainly in opposition to effective *desegregation* in Seattle, events there must be recited in some detail." (Emphasis added.)

The underscoring in this excerpt emphasizes a critical semantical ambiguity which the districts have quite deliberately—and so far, at least, successfully—sought to interject into this case since the very outset. The words "segregation" and "racial imbalance," one will note, are used interchangeably (as they have been throughout this litigation).

The inference to be drawn from repeated use of such words as "segregation," "segregated" and "desegregation," of course, is that *de jure* segregation (*i.e.*, some form of dual school system, some officially imposed or sanctioned separation of the races) exists in all three districts *compelling* remedial action (*i.e.*, steps taken pursuant to a constitutional duty) which is, according to appellees, frustrated by Initiative 350.

As much as these school districts may imply that Initiative 350 interferes with the performance of some constitutional duty to remedy the effects of a dual school system, however, the instant case does not present that issue at all. There has been no showing that there is now or ever has been "segregation" (in the sense of *de jure* segregation) in any of these districts or, for that matter, any other school districts in Washington. The only showing so far made is that the traditional and natural distribution of students in Washington's 300 school districts results in a condition in three of those districts which, according to differing administrative formulae developed by those districts, could be described as racial "imbalance" in their respective student populations.

The districts have strived mightly to insure that this particular element of confusion remains ingrained in any analysis of the pivotal issue of this case, for the policy underpinnings of their position depend upon its presence. Their insistence upon the presence of some affirmative constitutional duty on the part of individual school board members, for example, is predicated on equation of the terms "racial imbalance" and "*de jure* segregation." And the validity of their contention that Initiative 350, if implemented in Seattle, will somehow accomplish "resegregation" of Seattle's schools depends absolutely on

some constitutional sanctity being accorded that district's definition of "racial imbalance" in its schools. Logically, their argument in this regard depends on some perfect equation of their own criterion for determining racial imbalance in student distribution with the term "segregation." To this extent, then, it is transparent that the position taken by the districts before this Court posits the existence of a constitutional standard of racial balance, a proposition specifically rejected by this Court in *Swann v. Board of Education*, 402 U.S. 1 (1971) and *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976). In *Spangler* this Court noted at 427 U.S. 434 that:

> "The District Court's interpretation * * * appears to contemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which * * * *Swann* expressly disapproved."

If for no other reason, the weakness of their analysis is apparent from the fact that these formulae are eternally subject to change.

But there are other reasons. Even if the criteria for determining when Seattle's schools suffer from "racial imbalance,"[11] or when Tacoma's school children suffer from "racial isolation"[12] or when Pasco's schools are

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[11]The Seattle School Board currently defines "racial imbalance" as the condition which exists when:

> "* * * the combined minority enrollment in a school exceeds the district-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body."

FF 6.9. Under this definition, of course, a school where the relative school enrollment is one-third black, one-third Asian and one-third white majority, would nevertheless be "racially imbalanced" since the minority population would exceed the district-wide combined minority average by more than 20 percent. If, on the other hand, the combined minority population in the District some day exceeds 80 percent then, without a change in Seattle's definition, a school which is one-third black, one-third Asian, one-third Hispanic, but which is not attended by a single white student, will nevertheless be "racially balanced," and minority students in that school will not be "isolated" from white students.

[12]The District Court found that the Tacoma School District defined racially imbalanced schools as those which had a combined minority enrollment of 50 percent or more or a single minority of 40 percent or

"segregated"[13] were not subject to change by the several districts which have chosen to adopt them, they simply do not rise to the dignity of constitutional standards. They are too flawed.

The Seattle School District's own expert witnesses testified, for example, that if the District had, instead, required that no school within the district could have a majority enrollment of less than 18 percent, then Seattle schools could all have been racially balanced (within the constraints of that criteria) under Initiative 350.[14] In Pasco, a school which is perfectly "balanced" on a one-to-one basis (*i.e.*, 50 percent minority students and 50 percent majority students) becomes "segregated" if one more minority student is added to the student population.

The definition of "racial isolation" adopted by the State Board of Education and the State Human Rights Commission leads to absurd results when applied in other major metropolitan areas throughout the State of Washington. In Spokane, for instance, where the combined minority population atthe time of trial was 7.05 percent, a student in a school which has a combined minority population in excess of 27.05 percent would suffer "racial isolation." Vancouver is an even more dramatic example of these senseless results. According to that criterion, a minority student in a Vancouver school which was fully 75 percent majority would, nevertheless, be "racially isolated."

The point is this. There are various definitions of "racial balance," "racial isolation," etc., in place in Wash-

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more. FF 5.1. This is a correct finding, but the situation in Tacoma changed during the period immediately leading up to this litigation. The Tacoma School District's definition of a "de facto segregated" school is determined by reference to the State Board of Education's definition of "racial isolation." When, in turn, the State Board changed its definition of "racial isolation," the Tacoma School District immediately found itself with more "segregated" schools than it had previously (although no change in school enrollment had occurred). (Tr. 386-88).

[13]The Pasco School District has never developed any working definition at all. It simply uses a federally-imposed guideline of 50 percent minority enrollment as a breakpoint. (Tr. 624-28).

[14]Ex. 92, pp. 12-13.

ington's school districts at this time. While some or all of them may make sense in some contexts, they are absurd in others. This fact underscores the correctness of this Court's holding that no one of them is embodied as an unchangeable standard incorporated into the Fourteenth Amendment. And because of this, it is absurd to argue that Initiative 350 will have any impact on "desegregation" in Washington.

III. THE "OVERBREADTH" ISSUE:

The School Districts' claim of an affirmative constitutional duty to achieve greater racial balance has another facet which is especially important with respect to Seattle. While we have addressed this issue, with clarity we hope, in our opening brief, a few further thoughts seem warranted in light of appellees submissions.

On the issue of whether predecessor school boards in Seattle have committed acts of *de jure* segregation, the District is studiously ambivalent. (See SD Br. 4, note 3) It apparently wishes this Court to view it as being in precisely the same position as a school district which has been judicially determined to have committed such acts. At the same time, however, it apparently wishes to preserve the option of presenting a defense to any charges of *de jure* segregation in Phase II of this litigation, should that phase occur.

But if Seattle is to be viewed in the present phase of this litigation as being in the same position as a district which has been judicially determined to have committed such acts, then Seattle's case is actually moot. For such a school district is simply outside the scope of the Initiative, as we have previously shown.

To keep its challenge to the Initiative from becoming moot, however, the Seattle School District suggests that the Initiative prevents the District itself from determining that it has committed such acts, and therefore has a constitutional duty to adopt a remedy. (SD Br. 38-42)

The Office of the Attorney General does not so

construe the Initiative. (State Br. 37-40)[15] But how does a constitutional issue arise if that construction is wrong? And what practical difference does it make as to who is correct on this issue of statutory construction?

If the members of the Seattle School Board make a good faith determination that their predecessors have engaged in acts of *de jure* segregation, one result is certain. They may continue the Seattle Plan without fear of any lawsuit from the Attorney General or any state agency.

This does not mean that Seattle's determination is not subject to legal challenge. A student or parent remains free to sue the District and to obtain a judicial ruling that Seattle was wrong in its determination. But until that happens Seattle is entirely free to rely upon its good faith judgment that it must continue its policy of extra-neighborhood assignments.

We again note, however, that this whole discussion is entirely academic. Phase II of this litigation has been designed by the District Court to answer that very question, if necessary. Seattle need not speculate on who might sue them. They already know. The Seattle Intervenor-Plaintiffs already have.

The issue of the proper construction of § 6 is, in the final analysis, a "non-issue," which has interesting procedural aspects, but no constitutional significance.

CONCLUSION

It should now be clear to the Court that upholding the validity of Initiative 350 will result in no retreat whatsoever from any of this Court's prior desegregation

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[15]The so-called Seattle Intervenor-Plaintiffs' attempts to persuade the Court that our position on the false issue of overbreadth "lacks candor" itself lacks the truthfulness which a submission to this Court deserves.

They claim that we somehow declined to give a formal opinion on the question of what a school district may lawfully do under Initiative 350 to remedy *de jure* segregation, and thus ducked the question for purposes of this litigation. ACLU, et al., Br. pp. 51-57. An examination of the questions posed which were admitted as Ex. A-89 at trial shows clearly, however, that the Attorney General *was not even asked that question.*

cases. On the other hand, invalidation of Initiative 350 will result in an unwarranted extension of *Hunter v. Erickson*, and a retreat from the principles announced in *Washington v. Davis*, *Arlington Heights* and *Personnel Administrator of Massachusetts v. Feeney*.

Initiative 350 is remedial legislation, intended to restore the traditional neighborhood school policy in the State of Washington. It will not result in any "resegregation" of schools in the State of Washington.

Respectfully submitted,

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No. 81-9

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE

Grant L. Anderson, Lee Bailey, Edward Diamond, D.V.M., H. Eugene Hall, M.D., Mark E. Hoehne, Levy S. Johnston, Roy E. Jorgensen, Walter H. Lewis, Roger H. Lincoln, Margaret R. McCarthy, Robert W. Randall, Philip B. Swain, Dale W. Thompson, Ollie Mae Wilson

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

This motion for leave to file the accompanying Brief as amici curiae is respectfully made pursuant to Rule 36 of this Court. Written consent to the filing of this brief has been granted by appellee school districts and appellee Seattle intervenor plaintiffs, and a true copy of

such consent is attached to the certificate of service filed herewith. Amici expect that written consent of the other parties to this proceeding is forthcoming.

The nature of amici's interest in this matter and amici's reasons for seeking this leave are stated in the accompanying brief under "Interest of Amici"; that discussion is incorporated in this motion.

Dated January 25, 1982.

Respectfully submitted,

HENRY M. ARONSON

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No. 81-9

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI

Amici Grant L. Anderson, Lee Bailey, Edward Diamond, D.V.M., H. Eugene Hall, M.D., Mark E. Hoehne, Levy S. Johnston, Roy E. Jorgensen, Walter H. Lewis, Roger H. Lincoln, Margaret R. McCarthy, Robert W. Randall, Philip B. Swain, Dale W. Thompson, and Ollie Mae Wilson are individual

citizens of the State of Washington who believe in the educational value of desegregated public schools. Each of these 14 amici is one of the 15 members of the Washington State Board of Education ("State Board"). With the exception of one individual, who in his official capacity represents Washington State's private schools on the State board, amici represent a geographical cross-section of private persons in the State of Washington, since the State Board consists of two persons from each of Washington's seven Congressional districts. In their official capacities, the members of the State Board neither authorized nor consented to the filing on their behalf of the appeal in this case, see J.S. D-3.

The State Board of Education in October 1978 adopted the language of the Joint Policy Statement with the Washing-

ton State Human Rights Commission, J.A. 65-69, defining racial isolation and declaring the responsibility and duty of Washington school boards "to assign children to buildings in ways which result in the maximum desegregation possible by whatever means that are necessary." These amici as individuals subscribe to the views expressed in the Joint Policy Statement.

Also in October 1978, the State Board passed a resolution condemning Initiative 350 as "motivated by the sole purpose of overturning the Seattle Plan for desegregation of that District's schools" and "harmful for education." J.A. 69-70 (The Joint Appendix fails to clearly indicate the division (in the middle of J.A. 69) between the Joint Policy Statement and the Resolution, and omits the word "harmful" at J.A. 70.) See Pl. Ex. 117.

Amici seek to present to the Court some of the educational and social policy reasons for public school desegregation, including the views of the U.S. Commission on Civil Rights, which the parties, due to their concentration on legal issues, have not emphasized.

SUMMARY OF ARGUMENT

Amici believe that this Court should affirm the Court of Appeals' judgment in this case, 633 F.2d 1338 (9th Cir. 1980), so as to encourage the voluntary action of local authorities designed to promote equal educational opportunities and protect constitutional rights. First, there are important and significant educational advantages for all children, and especially minority children, in a school system which is desegregated. Second, the argument that mandatory desegregation is counterproduc-

tive because it causes massive "white flight" is a dangerous myth, often cited as a reason to maintain segregation, which must be dispelled. Third, if laws like Initiative 350 are permitted to stand, then the most effective desegregation plans--those devised and supported by local school authorities--will give way to exclusively court-ordered plans, which are not infrequently accompanied by hostility and turmoil. This Court must not block the successful, voluntarily-enacted desegregation plans of Seattle, Tacoma, and Pasco, and plunge those cities into the years of racially polarizing, divisive litigation that would certainly follow.

ARGUMENT

A. Initiative 350 Would Interfere with the Nation's Essential Task to Desegregate Public Schools

Amici agree with the U.S. Commission on Civil Rights that

> school desegregation is the single most important task confronting the Nation today in the field of civil rights. Any retreat in our efforts to achieve this goal will seriously harm our efforts to move forward in other civil rights areas. Further, ... progress in desegregating our Nation's schools will not be achieved without the clear support and leadership of government officials at the national, State, and local levels. ... [T]hose in positions of responsibility [must] make such a commitment.
>
> The commitment ... must be made today so that children may be educated in environments where they will come to know one another as human beings and to learn that all people are truly created equal....

U.S. Commission on Civil Rights, With All Deliberate Speed: 1954-19?? at 1 (1981) (hereinafter cited as With All Deliberate Speed).

There is no longer serious doubt that school desegregation can be correlated with long-term achievement gains for minority students, with no corresponding decline in white students' performance. See, e.g.,

the studies cited in With All Deliberate Speed, supra, at 40-44. And of equal or greater significance than scores on standardized tests is the fact that minority students who have attended desegregated schools succeed in college at significantly higher rates than those who have attended segregated schools and have greater social mobility, id. at 43-44.

It does not deemphasize the importance of teaching fundamental skills to all children to point out that the public schools have yet another critical task: preparing young people to become citizens in this Nation's ethnically diverse democracy. We think it self-evident that enhanced interracial understanding, so crucial to curing some of the Nation's social ills, can only occur through the prolonged exposure, from an early age, to persons of different backgrounds. Respect

and appreciation for different ethnic groups simply cannot be taught strictly from a book--it must be learned from first-hand experience.

B. School Desegregation is a Prerequisite to Achieving Residential Integration

All who believe in public school desegregation would prefer that it could be accomplished without "busing". But research shows that without school desegregation, housing segregation will only worsen.

It is nearly an article of faith in the popular media that busing causes so much "white flight" from public school systems that it is counterproductive. Much of this misconception is attributable to failure to recognize that with or without desegregation, white enrollment in urban areas has declined sharply over the past two decades and continues to do so. But in fact, while there is no dispute that white

enrollment loss increases in most school systems in the year of implementation of a mandatory desegregation program, the long-term effects of school desegregation appear neutral or even positive. Rossell, School Desegregation and Community Social Change, 57 Law & Contemp. Probs. 133, 163-67 (1978). As initial apprehensions decrease and income constraints take precedence, some whites return to the public schools from private schools. More importantly, however, the guarantee of desegregated schools helps retain white families who would otherwise move out of minority or "transition"-area schools. Over time, segregated schools result in as much or more white enrollment loss than desegregated schools, because without school desegregation, whites in greater numbers leave the areas undergoing change from majority to minority status, and are

not replaced.

Thus, failure to desegregate schools only feeds the relentless, mutually reinforcing dynamic between school and housing segregation, and guarantees that schools will become more segregated. The District Court in this case, after extensive testimony and voluminous documentary evidence, recognized these facts. J.S. at A-25 (Finding of Fact 11.3). See, e.g., Pl. Ex.. 36, Tr. 133; Pl. Ex. 37, Tr. 132; Pl. Ex. 93, Tr. 357; and Pl. Ex. 138, Tr. 2005.

Because residential segregation will only worsen without school desegregation, and in turn intensify school segregation, school desegregation must continue so as to permit residential integration to occur.

C. Locally Controlled Rather than Court-ordered School Desegregation Must be Favored.

Finally, if this Court upholds

Initiative 350, it will likely be replicated all over the country. As a result, only court-ordered, and not school board-adopted, desegregation will occur in the future. This Court should encourage and protect the efforts of local officials toward school desegregation, especially since local leadership is such a critical element in the success and peaceful implementation of desegregation plans. The experience of Seattle, Tacoma, and Pasco, where desegregation has been peaceful and has successfully been "institutionalized" by the school system, stands in sharp contrast to the experience in Boston, Cleveland, and other cities where local political leadership fomented resistance to court orders and fanned the fires of racial fears.

Once cities have desegregated their schools and experienced desegregation's

benefits, there is widespread distaste for returning to segregation. See, e.g., Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980), cert. denied, 68 L.Ed.2d 238 (1980) (upholding school board's authority to continue desegregation plan where federal court's equitable powers have lapsed).

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment of the Court of Appeals should be affirmed.

Dated this 25th day of January, 1982.

Respectfully submitted,

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CLERK

No. 81-9

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
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IN THE

Supreme Court of the United States

JANUARY TERM 1981

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees,

v.

STATE OF WASHINGTON, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SEATTLE CHAPTER, JAPANESE AMERICAN CITIZENS LEAGUE

INTEREST OF THE SEATTLE CHAPTER OF THE JAPANESE AMERICAN CITIZENS LEAGUE

The Japanese American Citizens League (JACL) consists of over 100 local chapters throughout the U.S. representing over 29,000 members. Founded in 1930, JACL has

involved itself in many civil rights issues in Washington State, seeking court and legislative remedies. The Seattle Chapter has also gone on record supporting the Seattle Plan of the Seattle School District which includes but is not limited to the mandatory reassignment of students.

It has been JACL's belief that the public schools should be a model of an integrated society and reflect that belief through the promotion of equal educational opportunity which enhances the diverse ethnic and racial differences of American society.

It is JACL's belief that Initiative 350, if allowed to stand, would create segregated schools based upon race and severely limit the educational opportunity for all students, particularly those of Asian ancestry - Japanese, Chinese, Filipino, Korean, Vietnamese, and others from

Southeast Asia and the Pacific Islands. This restrictiveness, due largely to housing patterns, would create schools further segregated by ethnic Asian communities, thus cutting them off from educational opportunities available within a school district.

In the past, school desegregation efforts have focused predominately on the needs of Black and White students. Washington State schools, with its large Asian population, must consider language and ethnic diversity in its desegregation efforts and these must be addressed through an overall district wide basis rather than as a separate, centralized and segregated community within the district.

JACL believes that Asian students of Washington State should have no barriers to their educational opportunity and that lower court rulings which have invalidated Initiative 350 should be upheld.

QUESTION PRESENTED

Does a state initiative passed by the voters of the State of Washington which forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, create an impermissible legislative classification based upon racial criteria thereby rendering the initiative unconstitutional?

ARGUMENT

A. Introduction

We are in agreement with the statement of the case made by the appellee Seattle School District No. 1 in their answer to Appellant's Brief. In addition to that statement, we point out that Asians[1] constitute the second largest minority school population in the Seattle School District No. 1[2].

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[1] The use of the term "Asian" in this brief corresponds to the "Asian/Pacific Islander" racial identification code utilized in the publication, 1978-79 Racial Distribution of Students and Staff.* Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, December 15, 1978), p. 2.

[2] Asian students in the Seattle Public Schools number 5,846 (10.8% of the district-wide school population). Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, p. 199.

*The identification includes Chinese, Filipino, Japanese, Korean, Vietnamese, Southeast Asian, East Indian and Samoan school children.

Asians in Seattle have been traditionally segregated/isolated in the Beacon Hill, Rainier Valley and Southeastern section of the city. A 1977 study of the distribution of the minority school population in Seattle reported that the Japanese and Chinese remained concentrated in the Beacon Hill and the Rainier Valley neighborhoods[3]. The report showed that Samoans

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[3] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, (City of Seattle and Seattle Public Schools, October, 1977), pp. 27-28.

In the 1977-78 school year, there were 5,668 (9.7%) Asians in the District-wide school population. The Chinese students numbered 1,707 (2.9%) and the Japanese students numbered 1,242 (2.1%). Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, December 10, 1977), p. 177.

In the 1980-1982 school year, there were 7,300 (15.1%) Asians in the district-wide school population. The Chinese students numbered 1,933 (4.0%) and the Japanese students numbered 874 (1.8%). Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, November 15, 1977), p. 4.

predominantly resided in Southeast Seattle[4] and the Filipino population was becoming increasingly concentrated in that same geographical area[5].

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[4] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, p. 37.

In the 1977-78 school year, 283 Samoan school children were enrolled in the Seattle Public Schools. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, p. 177.

In the 1980-81 school year, 356 Samoan students were enrolled in the Seattle Public Schools. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, November 15, 1977), p. 4.

[5] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, p. 33.

Filipino school children numbered 1,435 (2.5%) in the 1977-78 school year. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, p. 177.

Filipino students numbered 1,443 (3.0%) in the 1980-1981 school year. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Vol. 1, p. 4.

Prior to implementation of the Seattle Plan, segregation resulted in a disproportionate concentration of Asian school children in attendance at schools such as Beacon Hill Elementary School and Dearborn Park Elementary School[6]. Such segregation/isolation within the public school system translated into inequitable and unequal educational opportunities for Asian students.

By reducing the segregation/isolation of Asian students, the Seattle Plan has afforded Asian students educational opportunities previously denied them. During the first year of implementation of the Seattle Plan, Asian school children at

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[6] In the 1977-78 school year, Beacon Hill Elementary School had 209 (56.9% of the total school enrollment) Asian students and Dearborn Park Elementary School had 138 (31.2% of the total school enrollment) Asian students. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, pp. 17-18.

Beacon Hill Elementary School and Dearborn Park Elementary School came to constitute a number of students in the respective student bodies more proportionate to the Asian presence in the total school population[7]. At the same time, Asian school children, who were only nominally present at other schools such as Schmitz Park Elementary School, Genesee Hill Elementary School and Magnolia Elementary School prior

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[7] In the 1978-79 school year, Asian students numbered 107 (33.3% of the total school enrollment) at Beacon Hill Elementary School and 98 (25.8% of the total school enrollment) at Dearborn Park Elementary School. Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, pp. 73-74.

In the 1980-1981 school year, Asian students (30.6% of the total student population) at Beacon Hill and 77 (25.1% of the total student population) at Dearborn Park. Seattle Public Schools, 1980-81 Racial Distribution of Students and Staff, Volume I, p. 31, 33.

to the Plan, now attend those schools in greater number[8].

Finally, a major concern of the Asian American community in Seattle was the coordination of the Seattle School District's Bilingual Education Program with the district's desegregation efforts. The Seattle Plan has integrated the bilingual

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[8] Comparative figures for Asian student enrollment for the 1977-78 and 1978-79 school years are as follows:

	1977-78	1978-79	1980-81
Schmitz Park Elementary School	21 (8.3)	36 (23.8)	71 (34.8%)
Genesee Hill Elementary School	8 (2.6)	50 (25.1)	53 (22.3%)
Magnolia Elementary School	28 (7.4)	44 (17.2)	57 (19.1%)

Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, pp. 95, 94, 66.
Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, pp. 95, 94, 32.
Seattle Public Schools, 1980-81 Racial Distribution of Students and Staff, Volume I, p. 46, 37, 57.

education program into the Seattle School District's desegregation efforts such that those Asians with limited English speaking abilities are not isolated nor segregated from the rest of the student population. It should be noted that the number of Vietnamese and other Southeast Asians has tripled in the last three years[9].

B. Asian Americans Have Suffered And Continue To Suffer From Invidious Racial Discrimination In The Area Of Public Education.

1. There is a long history of invidious discrimination against Asian Americans.

For many years, Asian Americans were denied the rights of equal opportunities in

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[9] In the 1977-1978 school year, there were 381 Vietnamese and 115 other Southeast Asian students (representing together 0.9% of the total student population) in the Seattle Public Schools. In the 1980-1981 school year, there were 942 Vietnamese and 964 other Southeast Asians (representing together 3.9% of the student population) in Seattle Public Schools. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I, p. 4.

this country. From the time that Asian immigrants first entered the country, those of Chinese, Japanese, Filipino, and other Asian ancestry encountered laws aimed to deny them rights enjoyed by American citizens. Immigration laws were passed to deny Asian immigrants the rights to citizenship[10]. Alien land laws were passed to deny Asians the right to own land[11]. California, for example, assessed taxes on the Chinese such as a Foreign Miner's License, a passenger tax, and a Chinese Police tax (which assessed a monthly tax of $2.50 on every Chinese over the age of eighteen.)[12].

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[10] See the Chinese Exclusion Act of 1882, Act of May 6, 1882, ch. 126 § 1, 22 Stat. 58 (1882); Ozawa v. United States, 260 U.S. 178 (1922).

[11] See McGovney, the Anti-Japanese Land Laws of California & Ten Other States, 35 Cal. L. Rev. 7, p. 54 (1947).

[12] McGovney, Ibid, page 54, Appendix A, Anti-Chinese Legislation of California.

Many laws were passed to prevent Asians from being employed in a variety of occupations ranging from hairdressing to the law. The city of Seattle passed an ordinance restricting the Japanese from becoming pawnbrokers[13]. The Japanese in Washington State had no right to incorporate a business[14].

Many occupations in Washington State required United States citizenship. But for many years, Asians could not be naturalized and were "ineligible for citizenship". Aliens in Washington State could not: serve as a justice of the peace; serve process; become optometrists; become medical examiners; teach in the public schools on a permanent basis; incorporate a

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[13] Seattle City Ordinance passed in July, 1921, upheld in Asakura v. Seattle, 122 Wash. 81 (1922), but struck down, 265 U.S. 322 (1924).

[14] See Yamashita v. Hinkle, 260 U.S. 199 (1922).

bank; become firemen, policemen, or sheriffs; or sell alcohol. Washington statutes required citizenship or intended citizenship in a variety of licensed occupations, including accountants, architects, beauticians, dentists, lawyers, chiropractors, and pharmacists[15]. Clearly, when Asian immigrants were ineligible for citizenship, the operation of these statutes precluded participation by many Asians from these activities and occupations.

In the area of public education, Asian school children have long been the victims of racial segregation. In 1885, a young Chinese girl sued to obtain permission to attend the San Francisco public schools after school officials denied her admission. In Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885), the California Supreme

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[15] See Hsieh v. Civil Service Commission, 79 Wash. 2d 529, 548-549, 550-552, 488 P.2d 515 (1971)

Court ordered that she be admitted. Thereafter, California's legislature passed a bill in 1885 which stated:

> Every school, unless otherwise provided by law, must be opened for the admission of all children between 6 and 21 years of age . . . Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be permitted into any other school[16].

The segregated San Francisco school system was upheld against constitutional attack in the California State Supreme Court in Wong Him v. Callahan, 119 F. 381 (9th Cir. 1902). A similar challenge to the exclusion of Chinese Americans from white schools was denied by the U.S. Supreme Court in Gong Lum v. Rice, 275 U.S. 323 (1927). In this case, a Chinese

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[16] Act of March 12, 1885, ch. 117, §1, 1885 Cal. Stat. 99 (1885).

American named Martha Lum wanted to go to a white school in Rosedale, Mississippi, but school officials ordered her to go to a segregated black school. Said the Court:

> The question is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished education equal to that offered to all[17].

The Court said there was no denial of equal protection relying on the case which established the "separate and equal" doctrine, Plessy v. Ferguson[18].

Segregation was not limited to the schools. In Seattle, segregated housing conditions limited Asians to certain parts of the city. The use of "restrictive covenants" prohibited Asians from residing in such areas as Magnolia, Broadmoor, Ballard, and the Lake Washington districts.

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[17] 275 U.S. at 79.

[18] Plessy v. Ferguson, 163 U.S. 537 (1896).

Asians moved into the First Hill area and the Beacon Hill area because these areas were the only ones in Seattle not covered by restrictive covenants[19]. The use of privately created restrictive covenants was upheld by the United States Supreme Court, Corrigan v. Buckley, 271 U.S. 323 (1926). The use of such covenants and court enforcement probably contributed to the maintenance of Chinatowns, Japantowns, and Manilatowns in Seattle.

2. Asian Americans still suffer from the effects of past discrimination.

In the last twenty-five years, great strides have been made in the area of civil rights. Laws discriminating against Asian Americans and other minorities have been struck down, primarily on the basis of

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[19] Chin, Golden Tassels, a History of Chinese in Washington, 1857-1977 (Seattle: Art Chin, 1977) p. 53.

the equal protection clause of the Fourteenth Amendment. The central purpose of the Fourteenth Amendment was to guarantee equality for blacks, e.g., Slaughterhouse Cases, 16 Wall. 36 (1873) and by extension, it has come to afford equal protection for other minority groups including Asians. See e.g. Graham v. Richardson, 403 U.S. 365, 29 L. Ed 2d 534, 91 S. Ct. 1848 (1971); Oyama v. California, 332 U.S. 633 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Those racial and national origin classifications struck down involved either unequal treatment of a minority group, e.g. Yick Wo v. Hopkins, supra (discriminatory application of an ordinance) or the exclusion of minority groups from participation in the majority social institutions, with the resulting stigma of inferiority. See Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954).

Brown v. Board of Education, supra, is the landmark case in the area of establishing equal opportunities in public education. In striking down the "separate but equal" doctrine of Plessy v. Ferguson, supra, the 1954 U.S. Supreme Court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such a right, where the state has undertaken to provide, is a right which must be made available to all on equal terms.

347 U.S. at 493.

Yet, despite Brown, supra, Asians are still being denied equal educational opportunities.

In 1971, the U.S. Supreme Court ruled in Lau v. Nichols, 414 U.S. 563, 39 L. Ed 2d 1, 94 S. Ct. 786 (1974), that special educational benefits must be provided to 1,800 Chinese speaking school children in San Francisco who were linguistically disadvantaged due to their race and

culture. In ordering bilingual instruction pursuant to Title VI of the 1964 Civil Rights Act, the Court said:

> Discrimination is barred which has that effect even though no purposeful design is present . . . It seems obvious that the Chinese speaking minority receives fewer benefits than the English speaking majority from the school system which denies them a meaningful opportunity to participate in the education program.

The Supreme Court concluded that "students who do not understand English are effectively foreclosed from any meaningful education" and that school districts are obligated to provide educational programs to meet such special needs of its minority students. Lau v. Nichols, supra, 414 U.S. at 566. Asians constitute the largest group of students in the Seattle School District who do not understand English and require special bilingual instruction. In designing the desegregation program, the Seattle School District has responsibly

met these special needs of Asian school children. Bilingual students have been coordinated into the desegration effort[20].

In 1973, in DeFunis v. Odegard, 416 U.S. 312, 40 L. Ed 2d 164, 94 S. Ct. 1704 (1974), a white student challenged the minority admissions program at the University of Washington Law School on the claim of "reverse discrimination". At that time, Japanese and Chinese Americans were not considered minorities by the Law

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[20] In fact, when bilingual students are counted, the number of minority students being bused is more than a thousand (1,333) more than the number of white students. Without counting bilingual students, approximately 153 more minority students than white students are bused. See the Seattle Plan For Eliminating Racial Imbalance, Fifth Year Summary Report in Response to Community and School Board Members' Questions, a report prepared by the Seattle School District's Division of Evaluation Services attached to a memo from David Colwell to Donald Steele, entitled "Facilities Consolidation impacts and Desegregation Implementation", December 15, 1981.

School. Although the case was held to be moot, Justice Douglas wrote an opinion finding the minority admission program to be unconstitutional. But he also said that preferential admissions might be sustained if its purpose was to remedy past discriminations and noted that:

> if that were the standard, the current University of Washington policy would surely fail, for there is no western state which can claim that it always treated Japanese and Chinese in a fair and even-handed manner.

416. U.S. at 316[21].

To this very day, Asian Americans are still subject to the effects of racially segregated school systems. See Guey Hueng Lee v. Johnson, 404 U.S. 1215 (1971) (San Francisco school system); Soria v. Oxnard

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[21] Shortly after, the U.S. Law School changed its minority admissions policy to include Japanese and Chinese.

School District, 386 F. Supp. 539 (C.D. Cal. 1970); Crawford v. Board of Education of the City of Los Angeles, 17 Cal. 3rd 280, 94 Cal. Rptr. 531 (1976). Although these case concerned public school districts in California, these involved school districts which had a sizeable Asian American population[22]. The Seattle School District has currently an Asian student population of 7,300, approximately 15.1% of the total student population of 48,415[23]. A vast majority of these Asian Students live in Southeast Seattle, an area where much of Seattle's minority population

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[22]The 1970 U.S. Census data indicates that 110,000 Asian Americans lived in the City and County of San Francisco and another 238,000 lived in Los Angeles County.

[23]See Footnote #3.

resides[24]. A recent study conducted by the Seattle School District indicates that if students were confined to the nearest or next nearest school, twenty-six schools would be racially imbalanced, almost all of which are located in Southeast Seattle[25]. Nineteen of these schools are at the elementary level[26].

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[24] The Southeast Seattle area has many census tracts which the total minority student population of the census tract population is above 80%. See Seattle Public Schools 1980-1981 Racial Distribution of Students and Staff, Vol. 1, p. 108.

[25] See Seattle Public Schools, The Seattle Plan For Eliminating Racial Imbalance, Fifth Year Summary Report in Response to Community and School Board Members' Questions, p. 8-9, attached as part of a December 15, 1981 memo from David Colwell to Donald Steele entitled "Facilities Consolidation Impacts and Desegregation Implementation.

[26] Ibid.

In Johnson v. San Francisco United School District, 339 F. Supp. 1315 (N.E. Cal. 1971), vacated and remanded on other grounds, 500 F. 2d 349 (9th Cir. 1974), the San Francisco public schools were found to be racially segregated. In an opinion supporting a plan for desegregation, Federal District Court Judge Weigel said:

> And there are solid reasons for supporting the parties in the plans for desegregation of all races. The multiplicity of racial backgrounds makes effective desegregation more, not less, important. All who testified on the subject were unanimous in pointing out that the evils of racism and ethnic intolerance are not limited to black and white alone. Those who oppose desegregation, however well intentioned, would deprive children of the most meaningful opportunity to know members of different races. Opposition to desegregation fosters false concepts of racial superiority and racial inferiority. And opposition to desegregation in the elementary schools is particularly ill-advised. It works to prevent the kind of exchange in formative years which best inoculates against racial hatred. Racial hatred is an adult rather than a childhood disease.

339 F. Supp. at 1320.

This statement applies with equal force to the Seattle Plan. Asian Americans have fought hard for their right to equal opportunities under the law. The right to equal educational opportunity is well established. Any attempt to interfere with the Seattle desegregation plan, however well intentioned, should be weighed against the constitutional right to equal educational opportunity.

C. Initiative 350 Created An Impermissible Racial Classification Which Placed Special Burdens On The Attainment Of Policies Favoring Minorities.

A law which differentiates on the basis of race, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483 (1954). Unless there is a compelling state interest which cannot be achieved in another way, such a law will be

struck down under the Fourteenth Amendment of the United States Constitution. The district court and the Court of Appeals properly relied on Hunter v. Erickson, 393 U.S. 385 (1969) and Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y., 1970), aff'd, 402 U.S. 935 (1971), in ruling that Initiative 350 created invidious racial classifications unjustified by any compelling state interest.

In Hunter v. Erickson, supra, this Court held that §137 of the Akron, Ohio City Charter violated the Fourteenth Amendment. Section 137 prevented the city council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of a majority of the voters. The Court invalidated that law because it created, "an explicitly racial classification treating racial housing matters

differently from other racial and housing matters." Id. at 389. Although seemingly neutral on its face, §137 specifically singled out one category (anti-discrimination housing ordinances) and made it much harder for the beneficiaries of such ordinances (minorities) to get them enacted. The reality is that the law's impact falls on the minority by placing "special burdens" on racial minorities within the governmental process. Id. at 391.

A three-judge court held Hunter dispositive of the question presented in Lee v. Nyquist, supra. In that case a New York statute prohibited state education officials and appointed school boards (but not elected boards) from assigning students to different schools for the purpose of achieving racial balance. Hunter, according to the court in Lee v. Nyquist, stands

for the rule that "the state creates an implicit racial classification whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area. Id. at 718.

The New York Statute in Lee v. Nyquist had the same effect in that it created a single exception to the broad supervisory powers that the state Commissioner of Education exercised over local public education. The exception placed burdens on the implementation of educational policies designed to deal with race on the local level, operated in practice as a racial classification, was not excused by any compelling interest and was, therefore, a violation of the Fourteenth Amendment. Id. at 718-19. The court noted that the statute must fall because it structures the internal governmental process in a manner

not founded on neutral principals. Id. at 720. This Court expressed its approval by summarily affirming this lower court ruling.

Initiative 350 is like the charter provision in Hunter and the statute in Lee. It creates a racial classification, treating racial student assignment matters in education differently from other student assignment matters. It singled out and negates one of the many school district powers (assigning students to schools other than their nearest or next nearest school) while allowing school districts to asign students beyond their next nearest school for almost any other reason. The law's impact falls clearly on the minority student, by dismantling operative public school desegregation programs, preventing future local adoption of such programs and requiring minority students to initiate

expensive lawsuits to enforce their constitutional rights. Inititiative 350 is precisely targeted at voluntary local adoption of desegregation plans, and thus specifically burdens and, in fact, forecloses the attainment of important minority educational goals through the political process. It structures the political process in a non-neutral manner.

If Initiative 350 is allowed to go into effect, the schools in Seattle will once again be racially imbalanced. This will undoubtedly place special burdens on racial minorities because their children will be returned to racially segregated schools and they will be denied access to a full and meaningful education. Under a voluntary bussing plan which would result if 350 is upheld, the burden will fall on minority children to transfer to other schools as has occurred prior to implementation of the Seattle Plan. (See Siqueland,

"Without a Court Order", Madrona Publishers, 1981, p. 21).

History and current events teach us that today, unconstitutional laws will discriminate in a much more subtle manner than in the past because they will be designed to withstand legal scrutiny. Initiative 350 was drafted specifically to destroy Seattle's bussing plan and to survive a constitutional challenge. An informed reading of its language discloses its racially discriminatory purpose and intent. The Initiative was proposed to and accepted by the electorate as such. [RT 166-69, 192-93, 203, 275, 462-64, 466, 678, 738-40, 791-93, 1163, 1169, 1177-78, 1185; Exs. 38-40; Ex. 41, pp. 62-3, 64; Ex. 43, pp. 8-10; Ex 56; Ex. 95, pp. 16-21; Ex. 130, pp. 3-5.] The district court below also recognized this fact. [See District Court's Finding of Fact P. 7-9.] Unless

this Court reaffirms the constitutional infirmities of Initiative 350, an open invitation will go out to legislators to achieve constitutionally forbidden goals by art fully worded statutes. This Court has long ruled that a law, though racially neutral on its face, will not be constitutionally tolerated if it is an obvious pretext for discrimination. Yick Wo. v. Hopkins, 118 U.S. 356, (1886).

Because the state has failed to put forth any compelling interest for Initiative 350, the Court of Appeals'conclusion that it creates an impermissible racial classification in violation of the Fourteenth Amendment to the United States Constitution should be affirmed.

D. Assuming Hunter v. Erickson, Supra, And Lee V. Nyquist, Supra, Do Not Control, Initiative 350 Is Invalid Because It Was Enacted With The Intent To Discriminate On Racial Grounds And Therefore Violates The Fourteenth Amendment Of The United States Constitution.

It is well established that in order to challenge state action, such as Initiative 350, on the grounds such action results in unconstitutional racial discrimination and is a violation of the Equal Protection Clause of the Fourteenth Amendment, the challenging party must allege and prove the existence of a discriminatory intent and not just disproportionate impact. Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). This requirement has been applied in a school desegregation case. Columbia Board of Education v. Penick, 443 U.S. 449 (1979). However, it is equally well established that this Court does not intend to vitiate the protection of the Fourteenth Amendment by making it impossible to satisfy this requirement.

Washington v. Davis, supra, and its progeny consistently hold that discriminatory intent may be inferred from all the surrounding facts and circumstances. Washington v. Davis, supra, involved the validity of a written test given to police officer candidates in the District of Columbia. While this Court found the plaintiffs had shown a profound discriminatory impact which excluded a high number of black candidates, this Court upheld the test because the plaintiffs had failed to prove a discriminatory intent. This Court stated:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race, Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 65 S.Ct. 1064 (1886).

Id. at 242.

This Court proceeded to state:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, it is true, that the law bears more heavily on one race than another . . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

Id. at 242.

Village of Arlington Heights, supra, involved a question whether refusal by a zoning board to permit construction of low-income housing constituted racial discrimination. This Court upheld the action of the board and reaffirmed the requirement of proving discriminatory intent. In addition, this Court set forth the following examples of direct and

circumstantial evidence which could be used to show such intent:

1. Disproportionate discriminatory impact on one race.
2. The historical background of the decision (the sequence of events leading to it which include departures from normal procedural sequences).
3. The legislature or administrative history of the action.

429 U.S. at 267.

A more recent discussion by this Court on what is "discriminatory purpose" is found in Personnel Administrator of Massachusetts v. Feeney, supra. In that case a female challenged a Massachusetts law giving veterans lifetime preference for state employment on the grounds such law discriminated on the basis of gender and

violated the Fourteenth Amendment. This Court found the law not violative of equal protection in part because the law did not reflect a discriminatory purpose. This Court stated:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences (citation omitted). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U.S. at 279.

A careful reading of Personnel Administrator of Massachusetts v. Feeney and how lower courts have interpreted that case makes it clear that it is not the intention of this Court to impose a requirement that the appellees in this case and the other parties challenging Initiative 350 show that such Initiative was adopted in part "because of" a deliberate

purpose to cause a racially discriminatory impact. Instead, Personnel Administrator of Massachusetts v. Feeney reaffirms the proposition in Washington v. Davis that discriminatory intent may be inferred from the surrounding facts and circumstances:

> This is not to say that the inevitability or forseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch 39, §23, a strong inference that the adverse effects were desired can reasonably be drawn. (Emphasis added)

Id. at n. 25.

The Fifth Circuit in Lee v. Lee County Board of Education, 639 F.2d 1243 (1981), interpreted Personnel Administrator of Massachusetts v. Feeney to be consistent with Washington v. Davis and its progeny. In Lee, that court affirmed the district court's denial of a motion by the United

States for interdistrict relief to desegregate a school in part because the record failed to establish a racially discriminatory intent by the city. That court stated:

> Although Feeney makes clear that the intent required to support a finding of unconstitutional discrimination is a species of specific rather than general intent, Feeney did not alter the decisions in Washington v. Davis, supra, or Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L. Ed.2d 450 (1977), where the Court noted that a racially discriminatory intent might properly be inferred from circumstantial evidence.

Id. at 1268.

Based upon the facts and circumstances surrounding Initiative 350, this Initiative, even though a reflection of the majority of the people of the State of Washington, must be invalidated on the grounds that it was enacted in part because of impermissible and unconstitutional

racial discrimination and it therefore violates the Fourteenth Amendment. First the disproportionate and negative impact of Initiative 350 on Asians and other racial minorities is indisputable. The nullification by Initiative 350 of appellees' desegregation plan will result in dramatic increases in school segregation.

Second, the historical background of Initiative 350, the sequence of events leading to the enactment and the legislative and administrative history of the Initiative make it evident that it was intended to nullify the Seattle Plan and return the schools to their previous segregated state. (See appellees' complaint and memorandum in support of motion for preliminary injunction.) Initiative 350 was the final step in a concerted plan of opponents of mandatory bussing to prohibit this major part of the Seattle Plan. Leaders of CiVIC, the prime movers

behind Initiative 350, have admitted in deposition that this was the intent of the measure. (See p. 84 of the deposition of Robert Dorse attached as Exhibit C to the Affidavit of Michael W. Hoge). It is also evident from the long list of exceptions to the prohibitions of Initiative 350 that the only thing it was intended to prevent was reassignment of students to promote integration in the schools.

Third, even assuming Initiative 350 is neutral on its face, the inevitability and forseeability of the consequences resulting from its enactment, that is the return to segregation in Seattle schools, leads one to reasonably infer this result was intended. Finally, this Court in Village of Arlington Heights v. Metropolitan Housing Corp. concluded that there is no need to show that the discriminatory intent was the primary purpose of the measure as long as it was a motivating

factor, 429 U.S. at 255, and the totality of the circumstances related to the promulgation and passage of Initiative 350, strongly suggests that at least one motivating purpose, if not the dominant purpose, of the measure was to halt Seattle's desegregation plan.

CONCLUSION

Initiative 350 creates an impermissible racial classification not justified by any compelling state interest and should be declared unconstitutional. Furthermore, the Initiative was enacted with the intent to discriminate on racial grounds and should on this additional basis be declared unconstitutional.

Respectfully submitted,

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No. 81-9

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
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League of Women Voters of Washington,
League of Women Voters of the United States

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QUESTIONS PRESENTED

1. If a school district voluntarily adopts a program to reduce racial imbalance in its schools, does state action reversing such a program violate the Fourteenth Amendment?

2. When a school district voluntarily adopts such a program based on federal law strongly inviting, encouraging, and financing such action, is state action that would reverse such a program preempted, pursuant to clause two of Article VI of the Constitution?

3. To encourage such voluntary action should this Court adopt guidelines (termed herein the "Seattle Rule") providing that, if a school district adopts such a program, following procedures and containing elements specified by this Court, such program may not be interfered with so as materially

to increase racial imbalance, absent a compelling state interest, until the underlying conditions giving rise to such segregation or racial imbalance in the district's schools have been removed or have passed away?

4. Should such guidelines be:

(A) A determination by the school district that segregation or racial imbalance exists in its schools;

(B) A determination by the district that redressing such racial imbalance will improve the quality of education;

(C) Notice to and an opportunity for the public to be heard;

(D) Broad community participation in and approval of the program;

(E) Consideration of alternative remedies and associated ameliorative actions;

(F) Preparation of a written plan;

(G) Public availability of the written plan;

(H) Opportunity for public comment on the plan before its adoption;

(I) Inclusion in the plan of effective, substantive measures to reduce racial imbalance and the effects of racial discrimination;[1]

(J) Use by the school district of reasonable means for measuring progress towards the plan's objectives;

(K) Adoption of the plan?

---

[1]Measures purely voluntary on the part of children and their parents already condemned by this Court as ineffective or constitutionally inappropriate to reach constitutional objectives (e.g. the freedom of choice" plan invalidated in Green v. County School Board, 391 U.S. 430 (1967)) would be excluded or, if ineffective alone, would be usable only if coupled with effective measures.

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INTEREST OF AMICI CURIAE

All parties have agreed to the filing of this brief.

The League of Women Voters of Seattle is a non-profit, non-partisan corporation, affiliated with and sharing the aims and principles of the League of Women Voters of Washington and the League of Women Voters of the United States, each of which is also a non-profit, non-partisan corporation.

The League of Women Voters of Seattle favors ending racial imbalance in the Seattle schools. It opposed efforts to prevent school desegregation in Seattle and the related attempt to recall members of the Seattle School Board. It helped develop and endorsed the Seattle Plan and opposed Initiative 350. Its members live in and pay taxes in Seattle. Many have children in the Seattle schools.

The League of Women Voters of Washington favors voluntary but effective action

to correct racial imbalance in the schools. It opposed Initiative 350. Some of its members live in, pay taxes in, and have children in the schools of Pasco, Seattle, and Tacoma.

The League of Women Voters of the United States ("National League" herein) has about 114,000 members in over 1300 state and local Leagues in each state, the District of Columbia, Puerto Rico, and the Virgin Islands. Since 1920, the National League has promoted political responsibility through informed, active citizen participation in government. Among its guiding principles, it believes that no person or group should suffer legal, economic, or administrative discrimination.

In support of its position for equal access to education, the National League has long endorsed school desegregation, has supported federal efforts to assist school

desegregation plans, and has opposed restrictions on judicial and agency authority to fashion remedies.

At the state and local level, Leagues have promoted peaceful school desegregation in many ways, including: serving on advisory committees; working with local government, the media, and parents; promoting human relations activities; and when necessary, litigating. The League has promoted voluntary integration and has helped put into effect court-ordered plans to desegregate the schools.

All the League amici are concerned about the burdens now borne by the Federal judiciary, and want the "judicial power of the United States"[1] conserved, protected, and nurtured.

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[1] U.S. Const. art. III, § 1.

STATEMENT OF THE CASE

We adopt the Statement of the Case in the Brief of Appellees but emphasize and add to it the following:

I. The Historical Background

The historical background is that of American slavery and its complex aftermath. Population changes have generally spread this aftermath among us. But we bear in mind that slavery early existed in the North as well as the South and that many of the serious problems which stem from it are now northern, not southern, problems. Slavery preceded the Constitution[2] and compromised that document. Slavery compromised many of those from whom that document

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[2] On July 3, 1776, after debate, words critical of the King for his maintenance of the slave trade and for allegedly inciting slaves to rebel against their colonial owners were deleted from the draft Declaration of Independence. C. Bowers, The Young Jefferson 151 (Houghton Mifflin, 1945).

sprang. The aftermath of slavery lingers among, compromises, and burdens many of us today.

In his separate opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 387-94 (1978), Mr. Justice Marshall stated the relevant history. The amici adopt his statement.

One part of the aftermath of slavery has been pervasive, manifold segregation and discrimination, continuing well after a Declaration that "All [men] are created equal." In public school education, remedies for slavery's aftermath, begun with "all deliberate speed . . . ," have been underway for less than 27 years. From 1619, when slaves were first sold by a Dutch ship at Jamestown, Virginia, 335 years passed until the decision in Brown v. Board of Education (Brown I), 347 U.S. 483 (1954).

Given the tenacity, pervasiveness and variety of the means used to sustain slavery and its aftermath, even after Brown I, effective measures to erase slavery's aftermath will need equal tenacity, variety, and time in which to work.

Education is one such measure.

This case concerns three voluntary educational solutions to northern, urban school segregation, and deals with one part of the aftermath of slavery.

II. Adoption of the School District Programs; the Seattle Plan

All of the appellee school districts voluntarily adopted programs to end segregation and to redress racial imbalance. Of the plans, the Seattle Plan is the most elaborate. Its adoption triggered Initiative 350. Since the proposed Seattle Rule is based on the Seattle Plan, we deal primarily with it.

A. The Seattle Plan

In developing its plan to desegregate its schools, or, as the Seattle School District puts it, to correct "racial imbalance," the district did the following:

1. Racial imbalance determined

For the 1977-78 school year the Seattle School District adopted a voluntary magnet school desegregation program (J.S. App. A-16). Certain of the intervenor plaintiffs in this case thereafter threatened the district with legal action.[3] Seattle's Mayor and business and civic

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[3] Intervenor plaintiff, the National Association for the Advancement of Colored People ("NAACP" herein), complained to the Office of Civil Rights of the United States Department of Health, Education and Welfare alleging intentional segregation of the district's schools. This complaint was settled on June 7-8, 1978 (FF 6-1, J.S. App. A-15). Other intervenor plaintiffs, joined by the NAACP, later threatened a desegregation lawsuit (FF 6.12, J.S. App. A-18; C.R. 409, page 6).

leaders encouraged the district to define racial isolation and to end it promptly (Pltf. Exh. 11). On June 8, 1977, the Seattle School Board adopted Resolution 1977-8 (Pltf. Exh. 9), defining "racial imbalance" as:

> the situation that exists when the combined minority student enrollment in a school exceeds the district-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body. . . .

This resolution acknowledged school racial imbalance and mandated its end by the 1979-80 school year (Pltf. Exh. 9; FF 6.9, J.S. App. A-17).[4]

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[4]The Brief of Appellants at 42 cites part of Mr. Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), apparently for the proposition that the Seattle School District must first secure a judicial determination before it may take official cognizance of the risk that it may have, at some time in the past, acted unlawfully in

2. Quality of education

Resolution 1977-8 also found that:

> the best interests of the children of Seattle School District No. 1 will be served by providing all school children with the opportunity for quality multiracial education . . . .

3. Public notice and hearings

The school district gave the public notice and the extensive opportunity to be heard, as described below.

4. Broad community participation

Seattle broadly supported voluntary school district adoption of mandatory school desegregation measures. As noted, the Mayor and the presidents of the Chamber of Commerce, Municipal League and Urban

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(footnote 4 continued)

establishing de jure segregation. This seems a remarkable position for the State's chief law enforcement officer to maintain, given the importance to all law enforcement of voluntary adherence to the laws. Bakke, of course, dealt with state action excluding a white person from medical school, a case quite different from this one.

League urged the school board to adopt a process to end racial isolation in the Seattle public schools (Pltf. Exh. 6, 7, 11).

By Resolution 1977-9 (Pltf. Exh. 10) the board ordered extensive planning of desegregation measures (FF 6.9, J.S. App. A-17), including citizen input, and began to give massive publicity to such planning (Pltf. Exh. 6 at 2, 11).

Thirty public hearings were held throughout Seattle (Pltf. Exh. 7 at 14).

The district asked for plans and suggestions. The Seattle Urban League submitted a plan which the district in turn offered for public review (Pltf. Exh. 6 at 14; Pltf. Exh. 7 at 11).

5. Consideration of alternative remedies and related actions

School district planners drafted four different plans. Each plan included some

mandatory student assignment. These plans, the Urban League plan, and the merits of voluntary and mandatory measures to end racial imbalance were thoroughly discussed at the many public hearings. Educational enrichment and certain voluntary options were included in the plans (Pltf. Exh. 6 at 11; Pltf. Exh. 7 at 14-16).

6. Use of a written plan

The school district staff synthesized the five plans and the hearing results into a draft plan and presented it to the board in early December 1977 (Pltf. Exh. 6 at 11-12; J.S. App. A-17 to A-18).

7. Dissemination of the plan

The school district made the written plan available to the public (Pltf. Exh. 6 at 13).

8. Further public comment

Later in December 1977 the school board held more hearings on the draft plan and made further material changes (id.).

9. Inclusion of measures to reduce racial imbalance and racial discrimination

The plan promised to achieve, and has in fact achieved,[5] elimination or reduction (FF 6.13, J.S. App. A-18) of racial imbalance. Voluntary measures, theretofore tried alone and found ineffective (FF 6.5 -6.8; J.S. App. A-16 to A-17), were augmented and made effective by mandatory pupil assignment and busing. Voluntary enrichment from the earlier programs remained in the plan (FF 6.11; J.S. App. A-17 to A-18).

One-way burdening of particular racial groups, part of past voluntary practice (FF 6.6, 6.9, J.S. App. A-16), was avoided. Mandatory assignment was designed to affect

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[5] See Brief of Appellee School Districts.

many students, but to place burdens equitably (Pltf. Exh. 94). Children were not selected by race. Instead, the district chose neighborhood groups of children in fact or potentially known to each other who could share the educational value of discussing common experiences (Pltf. Exh. 7 at 16).

10. Means of measurement

The program relied on, and has administratively associated with it, reasonable means of measuring progress. The district, like most school districts, regularly tests, measures, and administratively reviews. The district uses an annual school census (Pltf. Exhs. 78-88) and achievement testing together with other appropriate measures for appraising desegregation and the other effects of its programs.[6]

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[6]This Court's ample "legislative fact" experience with school litigation enables

11. Adoption of the plan

On December 14, 1977, the school district, by Resolution 1977-28 (Pltf. Exh. 12), chose the particular programs and methods to end racial imbalance in its schools. This resolution repeated the definition of "racial imbalance" in earlier Resolution 1977-8. The Seattle Plan, which carried into effect the resolution, was adopted in March 1978 after still more hearings and changes (Pltf. Exh. 6 at 14; J.S. App. A-17).

III. Housing and School Segregation.

The District Court found that in each of the appellee districts there are residential areas in which minority races predominate (FF 3.3, J. S. App. A-7).

(footnote 6 continued)

it to take notice of the availability and use of such measures. See discussion, Fed. R. Evid. 201, Notes of Advisory Committee on Proposed Rules; C. McCormick, Handbook of the Law of Evidence §325 (1954).

In Pasco proper, non-whites found it hard to find housing and located largely in East Pasco. In nearby Richland "rigid Federal housing regulations . . . excluded blacks" (FF 4.1, J.S. App. A-9). East Pasco is "between 92 and 97 percent minority. . ." (FF 4.4, J.S. App. A-9). Residential segregation in Pasco resulted in racially imbalanced schools (FF 4.2, J.S. App. A-9).

In Tacoma housing patterns and other factors had concentrated racial minorities at certain of the district's schools (FF 5.2, J.S. App. A-10).

In Seattle, the Court found that

> [T]hese segregated housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented. . . . (FF 6.14, J.S. App. A-18)

and that parents consider the quality and location of neighborhood schools to be important when deciding where to live (FF 7.32, J.S. App. A-23).

IV. Seattle's Prior Voluntary Programs

In Seattle voluntary student assignment measures advocated by intervenor defendant Citizens for Voluntary Integration Committee (CiVIC), among others, had been tried. Various such measures had been used since 1963 (FF 6.2, J.S. App. A-16). During 1976-77 the school district had developed, publicized, and encouraged participation in a voluntary "magnet" school desegregation program (FF 6.5, J.S. App. A-16).

But the magnet program did not attract enough white students to achieve racial balance and most of the overall movement was by black students (FF 6.6, J.S. App. A-16 to A-17).

The District Court found that despite extensive voluntary, magnet, and mandatory middle-school, desegregation programs, racial imbalance increased between 1970

and 1978, and that the board had concluded that a voluntary plan without a mandatory "backup," could not effect acceptable racial balancing (FF 6.8, J.S. App. A-17).

SUMMARY OF ARGUMENT

Absent remedial measures, there is a mutually reinforcing relationship between housing segregation and school segregation.

Education must be provided free of suspect, state-imposed classifications based upon race, whether blatantly or subtly phrased.

The Court should strictly scrutinize Initiative 350 to determine if its classification serves a compelling governmental interest.

When State action would reverse prior action to remedy segregation, the distinction between de facto and de jure segregation is not legally relevant.

A trial of the issue of whether segregation is de facto or de jure is not a

necessary precondition for remedial action to undo school segregation.

The Congress and this Court have authoritatively invited and encouraged local, voluntary action to end segregation.

When a local school district takes such action to carry into effect constitutional rights, subsequent state action impairing such local action is preempted.

Such preemption is, however, confined within a relatively narrow range defined by the Constitution and Federal law.

Once adopted, such voluntary school district action or policies may, of course, be changed, subject to strict scrutiny.

To aid in limiting future occasions for such strict scrutiny or determinations of preemption, this Court should give guidance, in the form of the "Seattle Rule" urged herein. This Court should thereafter

protect local voluntary action taken consistently with such guidelines.

Such guidelines will clarify necessary procedures for voluntary action and will encourage such action.

Adoption of such guidelines will help to reduce steadily increasing judicial burdens and will conserve, protect, and nurture the judicial power of the United States.

ARGUMENT

The League *amici* support the briefs of the Appellees and the Seattle Intervenor Plaintiffs and the positions asserted therein. For the reasons of policy and law argued in this brief, this Court should also adopt the Seattle Rule urged here.

The key facts in this case are that: (a) the three school districts acted voluntarily; (b) each program addresses segregation or racial imbalance which arises

from housing segregation; and (c) the State action being subjected to scrutiny is not direct State action originally taken to segregate the schools, as in the case of a dual school system. Instead the action is secondary state action, reversing a voluntarily-adopted desegregation remedy. Such state action, if upheld, will, however, resegregate the schools.

We first deal with the relationship between housing segregation and school segregation.

There is an intimate, symbiotic, and mutually-reinforcing relationship between residential segregation and school segregation.

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 21 (1971), the Court said, in discussing the importance of choices and policies as to school location:

> Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

The Court sees as clearly as do we this mutually-reinforcing relationship.

In their briefs, both the State and the United States virtually ignore this relationship.

The omission is significant.

In the Jurisdictional Statement the State twice used the term "racially neutral" in connection with both the neighborhood school assignment policy and Initiative 350 (J.S. at pp. 10, 17).

The brief for the United States of America states at page 12:

> The initiative does not split the citizenry into racially identifiable subgroups, and therefore does not classify persons according to race . . . .

Initiative Measure No. 350, of course, like all law, takes breath, life and meaning only in application to facts.

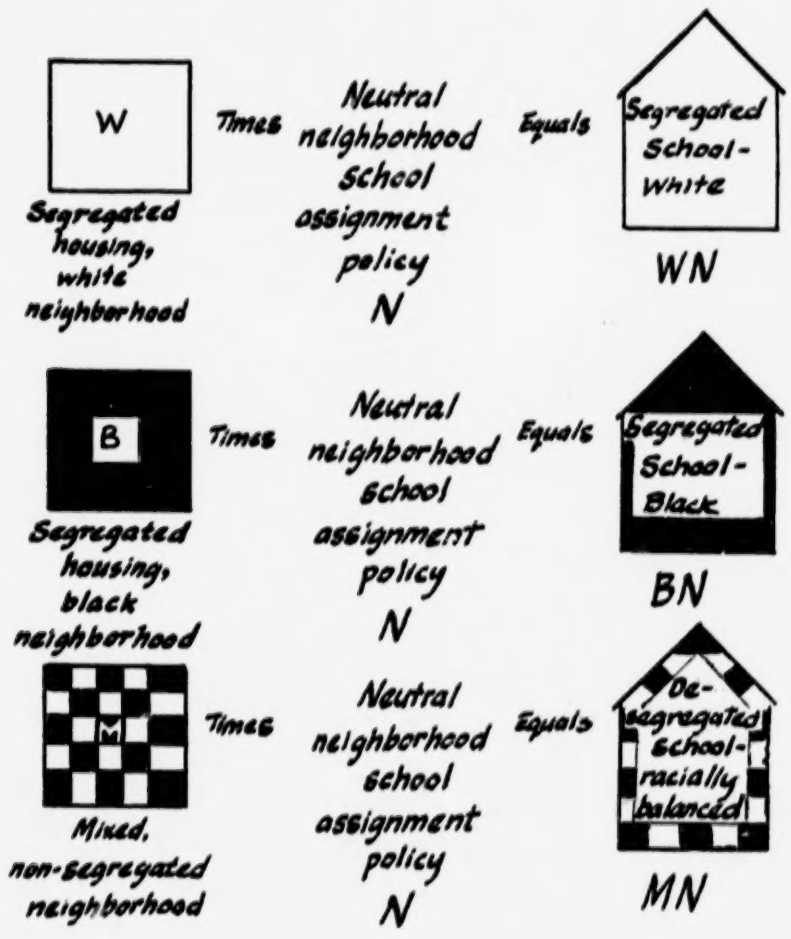
To ignore housing segregation when considering school segregation rests the argument in air and risks Mr. Bumble's comment in Oliver Twist that then "the law is a ass -- a idiot."

The initiative can be characterized as "racially neutral" only so long as the appellants ignore the District Court's findings as to housing segregation.

The Court understands this. But the appellants choose to use the term "racially neutral" in an effort to save the initiative.

The relationship between housing segregation and school segregation, absent intervention by voluntary school district or compelled judicial action, is so clear

that it can be graphically and mathematically represented as follows:



Expressed mathematically, if term W has the quality of being "segregated/white" then the product of W and n (Wn) necessarily has the quality of "segregated/white." Similarly, the product of the formula B x n (Bn) will have the quality of "segregated/black." In contrast, Mn, the product of M x n, will lack the quality of segregation, white or black.

Use of a neighborhood assignment policy in a district with segregated housing will result in segregated schools.

We next address the questions presented.

I. State Action That Reverses a Voluntarily Adopted Program to Reduce Or End Racial Imbalance In a School District Violates the Fourteenth Amendment

A. The Court should strictly scrutinize Initiative 350

The Court subjects to strict scrutiny state statutes or practices that explicitly

or implicitly disadvantage a "suspect class" or impinge upon a fundamental right protected by the Constitution. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973). Such state action is upheld only if it furthers a compelling governmental purpose, Loving v. Virginia, 388 U.S. 1, 11 (1967), and, even then, only if no less restrictive alternative is available, e.g., In re Griffiths, 413 U.S. 717 (1973).

Under these standards, equal protection of the laws is denied not only when laws and programs invidiously discriminate on their face against racial, ancestral, or similarly disadvantaged groups, e.g., Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), but when facially-neutral classifications mask invidious discrimination, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967), and when facially-neutral laws or

policies are discriminatory in administration, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). Equal protection is likewise denied when a classification implicates or penalizes, with no compelling governmental interest, the exercise of a fundamental right explicitly or implicitly guaranteed by the Constitution. Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

In public elementary and secondary education, the Court first applied these standards to strike down state-mandated school segregation in Brown I, declaring:

> in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

(347 U.S. at 495.) In Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955), the defendant districts were ordered to desegregate their schools "with

all deliberate speed." Desegregation was long delayed. The Court then complained of "entirely too much deliberation and not enough speed," Griffin v. School Board of Prince Edward County, 377 U.S. 218, 229 (1964); and, later, in Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968), demanded a plan "that promises realistically to work and promises realistically to work now."

The principles of Brown I have been used not only to strike down state-wide systems of one-race schools in the South, Cooper v. Aaron, 358 U.S. 1 (1958); United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972); but have been broadened to include other non-complying action, North or South, e.g., Griffin, supra (closing public schools and private school grants to white children); Goss v. Board of Education, 373 U.S. 683 (1963)

("minority to majority" student transfer plans); Green v. County School Board, supra (district-wide "freedom of choice" plans not sufficiently changing school racial composition).

While the Court has fashioned remedies for purposeful discrimination, it has not yet permitted federal courts to cure de facto segregation. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. 1. The de jure/de facto distinction has troubled some members of the Court. See Keyes (Powell, J., concurring). The distinction seems ambiguous after Brown I, where the Court stated at 494 that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children," the impact only

being greater when "it has the sanction of the law."[7]

Neither this Court, nor the Court of Appeals below, has yet held that a "neighborhood school policy" of itself justifies

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[7] As amici we are seriously troubled by the case-by-case, legal quagmire that has developed since Brown I.

In Bolling v. Sharpe, 347 U.S. 497, 500 (1954), the Court said,

> Segregation in public education is not reasonably related to any proper governmental objective . . . . In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

The duty thus defined is that of the Federal Government. All Federal instrumentalities, including this Court, are inhibited from "maintaining racially segregated public schools."

If children similarly affected by segregation (whatever the cause) apply to this Court to end such segregation, de jure or de facto, and if this Court denies relief on the basis that the segregation is merely de facto, is this Court itself "maintaining segregated schools?" And we believe that

court intervention in the absence of purposeful discrimination. Keyes v. School

(footnote 7 continued)

the proliferation and maintenance of complicated evidentiary doctrines, presumptions, and distinctions by this Court now more heavily burden plaintiffs who seek relief from de facto segregation than those who seek relief from de jure segregation. As a result, the first group of plaintiffs may not now enjoy the equal protection of the law.

These are troubling questions.

Even more seriously, the piling up of the ponderous procedural and evidentiary de jure versus de facto complexities obscures a simple truth.

American children need to be taught to think straight about race.

The best way to teach a child to think straight about race is to present him or her with the best evidence. The best evidence is available in the presence of other children like herself or himself in many ways, but superficially different, e.g., of a different race, creed, or color. In such circumstances, guided by wise teachers, the child may learn by experiencing this best evidence.

This is the powerful common sense of Brown I.

But now, white and black children, often living in segregated housing, do not have this best evidence readily available.

District No. 1, Denver, Colo., supra, (question expressly reserved); Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980); Diaz v. San Jose Unified School District, 612 F. 2d 411 (9th Cir. 1979). The Court has not yet said that de jure segregation will result if a local school district applies a neighborhood school policy to segregated housing.[8] In this area of law a majority

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(footnote 7 concluded)

It might be argued, as an abstract proposition, that the Nation which declared that "All . . . are created equal" has a special responsibility for such teaching. But the matter is, regrettably, not an abstract proposition. The darker side of our national history -- e.g., slavery and its aftermath; many of the national policies toward Indians; Manifest Destiny and the war against Mexico; the use of ethnic quotas in the immigration laws; and the wartime relocation of Japanese-Americans -- requires such teaching.

[8]Nonetheless, in school desegregation cases the Court has closely examined the effect of action, non-action, and desegregation remedies by local officials. See

has not yet applied the legal principle that a person is presumed to intend the natural and foreseeable consequences of his or her voluntary acts.[9]

(footnote 8 concluded)

Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973) (racially inspired school board actions have impact beyond particular schools subject to such action); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (finding of de jure segregation in 1954 imposes affirmative duty to disestablish dual school system and its effects); Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1979) (measure of post-Brown conduct under unsatisfied duty to desegregate is the effectiveness, not purpose, of actions decreasing or increasing segregation).

[9]Compare Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (disparate impact may be most important evidence of purposeful discrimination "[f]or normally the actor is presumed to have intended the natural consequences of his deeds") and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences") with Columbus Bd. of Educ. v. Penick, supra, at 464 ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose").

Instead, the Court has said that local school districts may not be compelled to desegregate absent purposeful discrimination. Milliken v. Bradley, 418 U.S. 717 (1974). The Court has also remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), the decision in United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976), where a local neighborhood school policy had been invalidated based on consequences foreseeable from its application to segregated housing. Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.).

We turn next to this case.

B. In this case the de facto/de jure distinction is irrelevant

The state action under review in this case is Initiative 350. An initiative is state action and as such must be exercised subject to constitutional restraints. Reitman v. Mulkey, 387 U.S. 369 (1967).

The target of state action here is, however, remedial action by other public entities of the State of Washington. Initiative 350, if applied, will undo "operative regulations" that these school districts have determined are needed to provide a more equal and better educational opportunity. See Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 405, 413 (1977). Their goal was termed a "constitutionally permissible" objective in Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978). See also Swann v.Charlotte-Mecklenburg Board of Education, supra, 402 U.S. 1.

Initiative 350 is not direct State action taken to segregate the schools, but action taken to undo remedial action and would resegregate the schools.

The de facto/de jure segregation distinction has been used to distinguish

between segregation caused by official action and that which arises from private, non-state action. The Fourteenth Amendment inhibits discriminatory "state action," including action fostering private discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

But when the Court scrutinizes state action that would reverse other clearly remedial state action, the de facto/de jure distinction is of little use. A distinction needed to guide courts in determining what is constitutionally forbidden in cases in which remedial action has not yet been taken, is not needed to analyze the quite different legal situation that arises where operative action in pursuit of constitutional objectives will be thwarted by reversing action. See Dayton I, supra.

If original state action to segregate the schools directly would have been suspect action, requiring strict scrutiny, then state action to reverse remedial action is itself sufficiently suspect as to need strict strutiny.[10]

The Court should lend its authority to maintain voluntarily adopted local gains against the aftermath of slavery, so that constitutional liberty will be increased and a perception of steadily increasing justice will be felt. We believe a society, perceiving increasing justice, will tend to be more peaceful and law-abiding.

C. Use of strict scrutiny in this kind of case will further sound public policy

The Court should protect and encourage voluntary school district action to

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[10] Initial remedial action itself must, of course, withstand constitutional scrutiny. Regents of the University of California v. Bakke, supra, 438 U.S. 265.

desegregate and correct racial imbalance for the following additional reasons.

First, school district action to voluntarily adopt a plan like the Seattle Plan, after the care and deliberation used by the school district, should carry great weight with a reviewing court. The process reflects and is in accord with due process of law.

Second, the board of directors of the Seattle School District adopted the Seattle Plan pursuant to an oath of office (J.S. App. A-18)

> to support the Constitution of the United States and the State of Washington and to faithfully discharge the duties of his [or her] office according to the best of his [or her] ability. (R.C.W. 28A.57.322.)

Third, except for judges themselves public school officials, more than most other officials, have fiduciary characteristics in relation to children.

The term "fiduciary" is very broad. It embraces "both technical fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another. . . ." Black's Law Dictionary 753 (Rev. 4th ed. 1968) ("fiduciary relation"). This aspect of school board duties is evidenced by the care that American electorates generally use in elevating persons to school board office. Voluntary, deliberate action by persons such as these, subject to needed judicial guidance, is action that judges can trust.

Fourth, present-day political realities suggest that it is unlikely that use of busing as a remedy will be abused. Such action will usually be taken if it is the only available alternative.

If the review standard urged here is adopted, nothing will later forbid change in a plan thus adopted, provided that the

change will withstand strict scrutiny to determine whether it offends the constitution. Even the most far-seeing plans, once adopted, may need revision to meet new needs. The fact that such change must itself meet constitutional requirements reinforces the desirability of adopting guidelines for voluntary action.

Fifth, adoption of a standard of strict scrutiny for such changes will not itself increase judicial business. If a standard of strict scrutiny as to later changes is adopted (a) the initial design and adoption of a plan will be done very carefully -- as was the Seattle Plan; (b) later measures of change will be carefully reviewed for their probable effect on constitutional rights; and (c) the annual school census will readily determine effects on racial imbalance. Moreover, where a violation of constitutional rights is now claimed, a person may already resort

to the Courts. On the other hand, if the appellants have their way, a burdensome, time-consuming, and expensive trial on the issue of de jure segregation will be needed, with its racially-polarizing effect of raking up past history in community after community.

Finally, the appellants argue for a procedure that will in fact make it more difficult to desegregate and then only to the barest extent required by the Constitution.

In other words, before voluntary action rooted in decency, courage, common sense, and neighborly openness may be indulged, there must be a judicial determination which, since Brown I, has become somewhat like a finding of criminal guilt.[11]

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[11] See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 199, n.10 (1973).

This is not healthy and decent politics.

Is it not paradoxical that, in the appellants' view, only an intentionally segregated school system can be desegregated (by court order), while a school system wishing for educational purposes to correct racial imbalance can be lawfully forbidden to desegregate?

Slavery was maintained by pervasive fear. Its aftermath is associated with fear. It takes courage to make these changes.

Concerned parents will doubtless continue to fear the new and will pressure school boards. Doubtless, members of this Court early in 1954 had reservations about what would lie before the country after the handing down of their opinion in Brown I.

As Golding teaches us from his allegory based on childhood in The Lord of the

Flies, courage is not the absence of fear, but rather its rational, ordered control.

Who among us can honestly say that he or she is wholly free from such fears? This Court is, of course, familiar with this. Slowly, patiently, firmly, but inexorably, this Court has been contending with and exorcising such fears. The moral dimension in helping others to moderate and control their fear has been part of this Court's work. In this regard the debt of all of us to the Court is incalculable.

D. The relationship between education and the rule of Law reinforces the need to strictly scrutinize measures which would reverse remedial action

This Court has increasingly acknowledged the importance of education and also the importance, in modern America, of diversity in student bodies. Sweatt v. Painter, 339 U.S. 629 (1950); Brown I, supra; San Antonio Independent School

District v. Rodriguez, supra, 411 U.S. 1; Regents of the University of California v. Bakke, supra, 438 U.S. 265.

Fundamental provision for education was made even before the Constitution was ratified.[12]

Horace Mann argued persuasively that education, in the hands of capable

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[12] In 1785, under the Articles of Confederation, the Congress ordained a rule of educational equality in establishing the foundations of the public land system, by providing "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township . . . ." Land Ordinance of 1785, reprinted in H. Commager, ed., Documents of American History 123-24 (9th ed. 1973). The Northwest Ordinance of 1787, drafted by Thomas Jefferson, provided in part:

> Art. 3. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. . . . " (H. Commager, supra, at 131.)

That Ordinance also prohibited slavery in the Northwest Territory. Id., art. 6.

teachers, tends to make persons more capable of governing themselves, less in need of being governed, and less likely to become ungovernable, and that education, to be publicly provided in reasonable amounts, tends to make for a more productive, happy, less angry and therefore more law-abiding citizenry.[13]

Public education since Brown I has changed, and is increasingly changing, the condition of many Americans. Many among us now do things which they could not do before Brown I. Since Brown I, education has helped to increase understanding and to reduce the tensions and anger that periodically threaten the rule of Law among us.

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[13] Twelfth Annual Report of Horace Mann as Secretary of the Massachusetts State Board of Education (1848), reprinted in H. Commager, supra, at 317-319.

Education directly supports both the values which the Constitution protects and the work of this Court. Educated persons, given clear and just laws, fairly adopted and properly applied, are more likely voluntarily to obey the law. If the laws are clear and persons are educated to understand the laws, citizen action and understanding is made easier and more powerful. Education thus specifically fosters the rule of Law, eases the burdens upon the judiciary, and conserves, protects, and nurtures the "judicial power of the United States."

The relationship between education and the rule of Law reinforces the need to use strict scrutiny in aid of educational measures to remedy the aftermath of slavery.

II. When a School District Voluntarily Adopts a Program to Desegregate Or Correct Racial Imbalance That Is Based On Federal Law Which Invites, Encourages, and Finances Such Voluntary Local Action, State Action Reversing Such a Program is Preempted

A. Congress may act

Section 5 of the Fourteenth Amendment provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

In acting, Congress need not remedy an evil completely or all at once. "[R]eform may take one step at a time." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). With respect to school desegregation, Congress favors voluntary local action. By so doing Congress has preempted state interference with local school board action desegregating district schools when such action furthers constitutional objectives.

B. Congress favors voluntary action

The Emergency School Aid Act of 1978, Title 20 of the U.S. Code, states:

§ 3192 Findings and purpose

(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

(b) The purpose of this subchapter is to provide financial assistance --

. . . .

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students. [Emphasis supplied.]

§ 3193 Policy with respect to the application of certain provisions of Federal law

(a) It is the policy of the United States that guidelines and criteria established pursuant to this subchapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

> (b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 2000d-5 of Title 42 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. [Emphasis supplied.]

(Emphasis supplied.)

The foregoing states the national policy favoring voluntary action to end segregation, whatever the cause.

C. Federal law subordinates Initiative 350's "neighborhood school policy" to the national policy favoring local voluntary action

The State quotes section 202 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, stating that it is the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." Brief of Appellants at 35.

The State does not quote fully. Section 217 of the Act, 20 U.S.C. §1716, also provides:

> Voluntary adoption of remedies.
>
> Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency. [Emphasis supplied.]

The neighborhood school policy has thus been expressly subordinated to the voluntary plans of Pasco, Seattle, and Tacoma.

Presidential messages have also favored voluntary action.

The President's Message to the Congress proposing the Emergency School Aid Act of 1970 stated:

To the Congress of the United States:

> Successfully desegregating the nation's schools requires more than the enforcement of laws. It also requires an investment of money. (48 Pub. Papers 448.2.) [Emphasis supplied.]

He proposed three aid categories, one being

> Aid to districts that wish to undertake voluntary efforts to eliminate reduce or prevent de facto racial isolation, with such aid specifically targeted for those purposes. (Id.)

The President further noted that:

> In most of our large cities, and in many smaller communities, housing patterns have produced racial separation in the schools which in turn has had an adverse effect on education of the children. It is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist local school districts attempting to overcome its effects. (Id.) [Emphasis supplied.]

In 1978 the President recommended amendments, later adopted, to the Elementary and Secondary Education Act to

"encourage voluntary local initiatives to overcome the adverse effects of minority group isolation. . . ." H.R. Doc. No. 95-296, 95th Cong., 2d Sess. 4 (1978) [Emphasis supplied].

Initiative 350 is a state policy that "may produce a result inconsistent with the objective of the federal statute." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Since mandatory student assignment is essential when housing is segregated, Initiative 350 is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

This preemption of state action is, however, narrow. It does not free local school districts to do whatever they would like, without legitimate and appropriate State supervision. As to all areas of

State supervisory action which do not offend preemptive federal law and the Constitution, the State may continue to act.

Preemption having occurred, there is, of course, a risk that later federal action may seek to undo what has been done. But federal action to impair the substance of constitutional rights, once defined, must itself be subject to strict scrutiny, otherwise constitutional protections will be meaningless. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

III. This Court Should Also Encourage Voluntary Action By Adopting Guidelines (Termed Herein the "Seattle Rule") Providing That, If a School District Voluntarily Adopts a Program, Following Procedures and Containing Elements Specified by This Court, Such Program May Not Be Interfered With So As Materially To Increase Racial Imbalance, Absent a Compelling State Interest, Until the Underlying Conditions Giving Rise to Such Segregation or Racial Imbalance In the District's Schools Have Been Removed or Have Passed Away

In Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 6, in reviewing a specific District Court plan, this Court adopted guidelines based on federal judicial experience in grappling "with the flinty, intractable realities" of putting Brown I and Brown II into effect.

In this case the Court also reviews specific plans which are, however, different from the plan reviewed in Swann in two respects. First, they were voluntarily adopted. Second, they have been effective in reducing racial imbalance.

The Seattle School District, as its litigation and election record amply indicates, has experienced its own "flinty, intractable realities."

As in Swann, the Court should issue guidelines in exercise of its equity power in this case for two main reasons.

First, difficulty in applying the Court's decisions has created a quandary for local officials obliged to take educationally responsible and lawful action.

Second, the lack of guidelines for voluntary action needlessly burdens the judiciary.

A. The Court has created a quandary for local school officials

In Brown I the Court stressed the importance of education. Since then matters have moved forward.

In Regents of the University of California v. Bakke, supra, 438 U.S. at 311-12 (1978), Mr. Justice Powell noted that one of the goals

> asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal . . .

If this goal is important at the graduate and undergraduate academic level, where attendance is not mandatory, it is even more important in the primary and secondary schools. The minds of such pupils are not fully formed. Such children may then be closer than they will later be to unwitting sources of prejudice. By law such children must be at school.

Segregation of children from each other by race is itself wrong, whatever the cause -- segregation by law, as said in Brown I, merely adding to the offense. How deeply, therefore, does it offend the sense of duty of school board members, and the sense of duty and the sense of professional responsibility of teachers, to compel them to place, maintain, and teach students in schools that are segregated -- for whatever reason?

In Brown II, 349 U.S. at 298, the Court incorporated findings of Brown I that "racial discrimination in public education is unconstitutional" and said:

> All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. [Emphasis supplied.]

The Court continued, at 299:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . . . [Emphasis supplied.]

Given such language, many local school board members have felt that they must attack a condition of segregation not yet judicially-determined as to cause, but bearing similarities to conditions elsewhere held to have been purposeful.

But in school systems with no judicially-determined record of de jure segregation there is difficulty in interpreting and applying this Court's pronouncements.

The Court has not spoken clearly.

We urge the Court to adopt a clear rule of decision for cases involving urban housing segregation and voluntary action that will define the role of, protect, and encourage voluntary local school district action and will promote equal justice under law.

B. Judicial burdens

The judiciary needs relief.

Federal judicial business is relentlessly increasing.[14] State court business shows similar increases.

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[14] Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1981 (1981); id., Workload Statistics for the Decade of the 1970's (1980); id., Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1980 (1980); id., 1979 Annual Report of the Director (1979).

Since 1960 civil rights cases have steadily increased within the judicial workload. Among civil rights cases the school desegregation cases are particularly complex, and time-consuming.[15]

Analysis also indicates that there is no single grand stroke which can help. Burdens added incrementally must be reduced incrementally. Marginal effects on parts of the total case-load are important. As to the school desegregation part of this work-load we urge:

First, strict scrutiny of statutes and administrative procedures interfering with remedial action will reduce the need for

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[15] In Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 14, the Chief Justice, in noting the need for "guidelines," commented in footnote 5:

> The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

long, complex trials on the de jure - de facto issue.

Second, if federal preemption protects local voluntary action, fewer court proceedings will be needed.

Third, clear guidelines shielding voluntary action will give rise to fewer cases.

With clear guidelines local school district counsel everywhere can advise school board members. School board members seeking election can cite a reinforced national policy favoring local voluntary action. Citizen action will be made more effective.

IV. The Proposed Seattle Rule

The guidelines suggested are set out in the fourth Question Presented and are discussed in our Statement of the Case.

As we have noted, most of what was done in Seattle is familiar, careful due

process of law. Seattle's experience indicates that school board members can stand for election on such a program and win. The Seattle Rule is good, decent politics.[16]

We do, however, want to say a word about "busing."

The duration of remedial measures should be measured by the duration of the underlying conditions to which such measures are addressed. When the underlying conditions have changed, the remedial measures can be abandoned.

But busing, as a remedy, will not be needlessly prolonged. Districts have strong financial incentives not to over-use this remedy.

A Seattle Rule will help the Court cut its way out of the current tangle of the

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[16] The power of the courts to order remedies for de jure segregation would, of course, not be impeded by the adoption of guidelines for voluntary action.

law and will clearly summon school districts and citizens to act voluntarily but effectively.

In protecting these appellee school districts this Court will encourage all school districts.

In closing, we suggest that the grand fallacy of the appellants' approach is to try, by ignoring the relationship between housing segregation and school segregation, to pit against each other two fundamental principles of justice which must be harmonized. The first such principle is that those who stand in equal circumstances before the law must be treated equally. The second principle is that justice must be "distributive" and must, in order to reach "equality," compensate for preexisting inequality and wrong.[17] These

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[17] Aristotle, The Nichomachean Ethics, Book V (The Oswald Translation - Bobbs-Merrill, 1962).

principles antedate written law. They are probably inherent in, and imprinted on, the structure of the human mind.[18]

In this case the distributive principle requires that, where housing is segregated, compensatory remedial action should be taken so that children who grow up in such segregated housing will have a chance to learn to think straight about race.

CONCLUSION

At Gettysburg, at Little Round Top, the Wheatfield, the Peach Orchard, and other quarters of that bloody field, sincere opponents contested the ground in terrible violence.

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[18] That these principles probably antedate all written law and are inherent in the structure of the mind can be ascertained by observing how frequently children, even very small children, regularly invoke them in dealing with their parental "law-givers."

In contrast, in Pasco, Seattle, and Tacoma, the fighting has been mostly by lawsuits and in elections. Because of the rule of Law,[19] the fighting has been bloodless. In Seattle, at least nine law suits, a recall campaign, the Initiative 350 campaign, and several school board elections have marked the contest.

It is now time for the end. Segregated schools in these districts, whatever the cause, should be ended -- forever.

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[19]The Fourteenth Amendment, part of the rule of Law in this country, is a child of war. At the Wheatfield the 1st Minnesota sustained 82% casualties and there, after six attacks and counter-attacks, the South left 500 of its dead. At the Peach Orchard, having four times asked permission of General Longstreet to take Little Round Top above the Union Left, Major General John B. Hood was wounded and borne from the field.

A long run promise of education is the curbing of some of the roots of violence and the sustaining of the rule of Law. In fostering education the Court fosters its own work.

As we said at the outset, we deal with the aftermath of slavery as it affects children.

> "'Woe unto the world because of offenses; for it must needs be that offenses come.'"

Lincoln enjoined us to have malice toward none, charity for all, and to bind up wounds.

Those in local school districts whose daily duty it is to bind up the wounds still being inflicted on children by the aftermath of slavery, should be given the protection urged in this brief.

Clear guidance should be given to local school officials so that they may do what they believe to be both educationally sound and lawful.

Strong citizen action should be encouraged.

We urge the Court not only to affirm the judgment of the Ninth Circuit, but to adopt guidelines (the Seattle Rule) for future cases involving school district voluntary action.

Dated: January 25, 1982

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-9

STATE OF WASHINGTON, *et al.*,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-9

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Appellees.

On Appeal From The United States Court of Appeals For The Ninth Circuit

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MOTION FOR LEAVE FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., TO FILE A BRIEF AMICUS CURIAE

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The NAACP Legal Defense and Educational Fund, Inc., hereby respectfully moves for leave to file the attached brief amicus curiae in this case. Counsel for appellees, the United States, and the Seattle intervenor-plaintiffs-appellees

have consented to the filing of the attached brief. The consent of the attorney for appellants was requested, but refused, thus necessitating this moion.

1. The NAACP Legal Defense and Educational Fund, Inc., (hereinafter "LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. LDF is independent of other organizations and is supported by contributions from the public.

2. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and

the lower courts involving a variety of race discrimination issues, including lawsuits brought on behalf of black parents and students to desegregate public schools. E.g., Brown v. Board of Education, 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Green v. County School Board, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Keyes v. School District No. 1, 413 U.S. 189 (1973). The Legal Defense Fund also has participated as amicus curiae in numerous desegregation cases in this Court. E.g., Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

3. Amicus also represents black parents and school children in numerous pending lower court cases. Those parents and children have a particular interest and concern in encouraging local school districts to undertake voluntary "affirmative action" programs to desegregate their student bodies and facilities without undergoing full-blown litigation, which is often taxing, time-consuming and expensive. LDF also has an interest in safeguarding the right of black parents and other black citizens, as exercised here, to seek redress of grievances and to obtain favorable governmental action through the political process on the same basis as all other citizens. As the attached brief points out, amicus believes that both these interests will be imperiled if Initivive 350 is upheld.

4. Amicus respectfully submits that its long experience in school desegregation matters and its familiarity with the social-science data on the success of desegregation remedies may assist the Court in resolving this matter.*/

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*/ The sole objection of appellants' counsel to LDF's participation as amicus -- that LDF's perspective is represented here by the Seattle, Washington Branch of the National Association for the Advancement of Colored People (NAACP), one of several plaintiff-intervenors -- is mistaken. Although originally founded by the NAACP, LDF has been a wholly separate organization from the NAACP for over 20 years, with a separate Board of Directors, program of operations, staff, office and budget. Moreover, while the NAACP is participating in this case solely on behalf of its members in Seattle, Washington, LDF seeks to participate in order to represent the interests of its clients in school desegregation litigation throughout the country. For these reasons, LDF has been permitted to participate as amicus curiae in cases in which the NAACP was also amicus, e.g., Regents of the University of California v. Bakke, supra, and in cases in which NAACP attorneys represented one of the parties, e.g., Columbus Board of Education v. Penick, supra; New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

WHEREFORE, for the foregoing reasons, amicus curiae NAACP Legal Defense and Educational Fund, Inc. prays that the attached brief be permitted to be filed.

Respectfully submitted,

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QUESTION PRESENTED

Does Initiative 350 violate the Fourteenth Amendment by structuring the political process of the State of Washington so that governmental action benefiting the minority victims of school segregation is more difficult to achieve than governmental action benefiting all other citizens?

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

==========

SUMMARY OF ARGUMENT

Amicus respectfully submits that this appeal is governed by the fundamental Fourteenth Amendment principle that a state must maintain political neutrality among the races and may not burden minority-group political participation by requiring racial

minorities to utilize more onerous means than all other citizens to obtain governmental action on their behalves. Hunter v. Erickson, 393 U.S. 385 (1969); Nyquist v. Lee, 401 U.S. 935 (1971), aff'g 318 F. Supp. 710 (W.D.N.Y. 1970). The fatal constitutional defect of Initiative 350 is that it is a "statute[] which structure[s] the internal governmental process" in such a way as to "make[] it more difficult for racial ... minorities" than for all other citizens to "further their political aims." Hunter v. Erickson, supra, 393 U.S. at 393 (Harlan, J., concurring). Because Hunter and Nyquist v. Lee are dispositive, we limit Part I of this brief to a discussion of the application here of the principle which animates those cases.

Part II briefly discusses the recent social scientific data establishing that desegregation of public schools is a

legitimate, indeed pressing, political goal of minorities, which has succeeded over the past fifteen years in dramatically improving academic achievement among blacks and race relations among all students.

ARGUMENT

I

INITIATIVE 350 VIOLATES THE FOURTEENTH AMENDMENT'S MOST BASIC PROHIBITION BY STRUCTURING THE POLITICAL PROCESS SO THAT GOVERNMENTAL ACTION BENEFITING THE MINORITY VICTIMS OF SCHOOL SEGREGATION IS MORE DIFFICULT TO ACHIEVE THAN GOVERNMENTAL ACTION BENEFITING ALL OTHER CITIZENS

In its most fundamental aspect, the Equal Protection Clause of the Fourteenth Amendment forbids the States from passing laws, not born of a compelling necessity, that classify blacks or other racial minorities differently, and less ad-

vantageously, than all other citizens, Slaughterhouse Cases, 83 U.S. 36, 71 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880); Ex parte Virginia, 100 U.S. 339, 344-45 (1880); Bolling v. Sharpe, 347 U.S. 499 (1954); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Loving v. Virginia, 388 U.S. 1, 10 (1967). This deep mistrust of legislative classifications singling out blacks or other racial minorities derives from a recognition that "prejudice against discrete and insular minorities" in this country historically has been "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities ...." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Because the Clause was designed as an antidote to the "position

of political powerlessness ... [in] the majoritarian political process" to which blacks and other racial minorities have been relegated in this country, San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 28 (1973),[1/] its prohibitory force falls heavily, perhaps most heavily, on "laws which define the structure of political institutions" so as to classify racial minorities less advantageously than all other citizens. Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring); see Mobile v. Bolden, 446 U.S. 55, 83-84 (1980) (Stevens, J., concurring); see e.g., White v. Regester, 412 U.S. 755 (1973); Nixon v. Herndon, 273 U.S. 536 (1927).

1/ See Foley v. Connelie, 435 U.S. 291, 294 (1978); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976); In re Griffiths, 413 U.S. 717, 721 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948).

A. Racial Classifications Distorting the Political Process

Forbidden racial classifications impinging on the political process include, for example, the simple denial to blacks and other racial minorities of the franchise available to all other citizens. Cf. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Board of Electors, 383 U.S. 663 (1966).[2/]

Similarly, it is fundamental to the Equal Protection Clause that the States may not unfavorably single out blacks or other minorities in the political arena by weighting their votes less heavily than

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2/ Such a classification is no less obnoxious to the Fourteenth Amendment because it disadvantages only some members of a racial minority -- for example, by depriving only blacks who wish to vote in the Democratic Party primary of the ability to do so. E.g, White v. Regester, supra; Nixon v. Herndon, supra.

the votes of all other persons -- for example, by affording blacks only one representative for every 10,000 citizens, while affording others one representative for every 5,000 citizens. Cf. Avery v. Midland County, 390 U.S. 474 (1968).[3/]

Finally, even where blacks and other minorities are allowed the franchise and representation equal to that afforded other citizens, this Court has recognized that the States offend the Fourteenth Amendment's fundamental requirement of political neutrality among the races when they pass "statutes which structure the internal governmental process" so as to "make[] it more difficult for racial and religious minorities [than for the rest of

---

3/ Again, such a classification violates the Fourteenth Amendment even if it does not victimize all blacks but only, for example, blacks living in urban areas. Cf. Reynolds v. Sims, 377 U.S. 533 (1964).

the citizenry] to further their political aims." Hunter v. Erickson, supra, 393 U.S. at 393 (Harlan, J., concurring) (emphasis added). For minority citizens are no less politically powerless with the vote than without it if the State has arranged the internal mechanics of government so that legitimate state action benefiting racial minorities is structurally more difficult to achieve than state action benefiting other constituencies. See Mobile v. Bolden, supra, 446 U.S. at 83-84 (Stevens, J., concurring).

In this light, for example, a state law requiring a two-thirds majority for legislation benefiting blacks, where a simple majority suffices for all other legislation, would clearly fall afoul of the Fourteenth Amendment. So, too, would a state law singling out only some blacks, or some substantive area of governmental

benefit of particular interest to some blacks, for disadvantageous treatment in the political process. Such was the holding of Hunter v. Erickson, supra.

B. Hunter v. Erickson

In Hunter the municipal lawmaking process in Akron, Ohio had in the past been structured so that the City Council could adopt any municipal ordinance relating to a legitimate goal of local government -- including, for example, the regulation of real-property transactions -- by a majority vote, subject to a citizens' veto if (i) 10 percent of the electorate signed a petition calling for a referendum on the ordinance, and (ii) a majority of the City's electorate thereafter disapproved the ordinance in a general election. See 393 U.S. at 387; id. at 393-94 (Harlan, J., concurring).

Hunter involved a constitutional challenge to a city-charter amendment, legislated by referendum, that partially rearranged this structure. Under the amendment, "[a]ny ordinance which regulate[d] the use, sale [or] lease ... of real property of any kind ... on the basis of race, color, religion, national origin or ancestry" not only had to secure the votes of a majority of the City Council, but also had to "be approved by a majority of the electors voting on the question at a regular or general election ...." Id. at 387. All other municipal laws -- i.e., ordinances not regulating the sale or lease of real property, and those regulating the sale or lease of real property on some basis other than race -- remained subject to the preexisting, less onerous legislative process.

The Court held that the charter amendment violated the Fourteenth Amendment. In so doing, both Justice White for the Court and Justice Harlan in concurrence noted that the charter amendment (i) was designed to rescind a fair-housing ordinance passed by the City Council in order to relieve racial and religious minorities of housing discrimination, and (ii) served to make the passage of municipal legislation by the City Council more difficult in the future by placing more power directly in the hands of the electorate, and less in the hands of the city government. But, as Justice Harlan's concurrence makes explicit, it was neither of these facts alone that rendered the amendment unconstitutional.[4/] Rather, the

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4/ In the first place, that blacks and religious minorities had utilized the

law was unconstitutional because, by way

4/ continued

pre-existing political process to benefit themselves by extending their statutory civil rights beyond what federal law required did not render unconstitutional the subsequent rescission of that action through exercise of the same general political process:

> Statutes ... which are grounded upon general democratic principle, do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage Negro political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If the [Akron City] Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.

Hunter v. Erickson, supra, 393 U.S. at 394 (Harlan, J., concurring). Accord, id. at 390 n.5 (majority opinion). See Dayton Board of Education v. Brinkman, 433 U.S. 406, 413-14 (1977) (school board's rescission of a prior board's resolution

of a nonneutral subject-matter classification, it required minorities seeking legislative protection from housing discrimination to surmount a referendum hurdle that stood in the way of no other

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4/ continued

initiating affirmative action to undo de facto segregation does not by itself violate the Fourteenth Amendment).

Similarly, were a state or local government to organize itself so that legislation, or even some racially neutral species of legislation -- say that regulating all real estate transactions -- is always difficult to pass, such a governmental structure would not necessarily violate the Constitution even though it might have the effect of hampering efforts by blacks to pass fair-housing legislation. Such a rule

> obviously does not have the purpose of protecting one particular group to the detriment of all others. It will sometimes operate in favor of one faction, sometimes in favor of another.

Hunter v. Erickson, 393 U.S. at 394 (Harlan J., concurring).

general, or even housing-related, legislation.[5/]

5/ Notably, the Akron law struck down in Hunter was facially neutral, since it subjected ordinances regulating real estate transactions "on the basis of race" to the same before-the-fact referendum requirement whether they benefited whites or blacks. The Court concluded, however, that the law's facial neutrality was a transparent disguise for a nonneutral classification drawn purely and clearly along racial lines:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, Anderson v. Martin, 375 U.S. 399 (1964), [the Akron charter amendment] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote on an equal basis with others. The preamble to the open housing legislation which was suspended by [the charter amendment] ... recited that the population of Akron consists

Because "the city of Akron ha[d] not attempted to allocate governmental power

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5/ continued

> of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by [the charter amendment] ... must be assessed.

Hunter v. Erickson, supra, 393 U.S. at 391 (citations omitted).

Since the classification covertly drawn by the law was based upon race (as well as ethnicity and religion) alone, and was not justified by a compelling necessity, the Court concluded that it violated the Equal Protection Clause without reference to the Akron electorate's motivation for drawing it. Id. at 389 ("we need not rest on [the Court's invidious-purpose cases] to decide this case. Here, unlike [in those cases], there was an explicitly racial classification treating racial housing matters different from other racial and housing matters"); id. at 395 (Harlan, J., concurring). As the Court

on the basis of any general principle," Hunter v. Erickson, supra, 393 U.S. at 394 (Harlan, J., concurring), or to provide "a political structure that treats all individuals as equals," Mobile v. Bolden, supra, 446 U.S. at 84 (Stevens, J., concurring), but instead passed "a provision that ha[d] the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest," the charter amendment violated the Fourteenth Amendment in the absence of a compelling justification. Hunter v.Erickson, 393 U.S. at 394 (Harlan, J., concurring).

5/ continued

subsequently reiterated in Personnel Administrator v. Feeney, 442 U.S. 256, 274 (1979), it is only "[i]f the classification itself, covert or overt, is not based upon [race]" that the courts must reach "the second question ... whether the adverse effect reflects invidious [race-] based discrimination" (emphasis added).

Hunter established that, while members of the political majority are free to (i) utilize governmental processes organized along a "general principle" to rescind state action benefiting racial minorities,[6/] and (ii) to subject themselves and all others, including racial

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6/ Of course, the invidiously motivated rescission of a prior benefit to minorities does violate the Constitution. Such is the case of Proposition 1 in California. See Crawford v. Board of Education of the City of Los Angeles, No. 81-38.

Similarly, state and local governments guilty of prior racial discrimination have a continuing affirmative duty to remedy its consequences and accordingly are not constitutionally free to withdraw rights or benefits serving that remedial purpose. E.g., Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). In advance of Phase II of the present litigation, we assume for purposes of argument that neither the State of Washington, nor any of the other municipal governments involved, is guilty of prior racial discrimination.

Notably, a finding that Initiative 350 is unconstitutional would probably remove any need for Phase II, since

minorities, to an arduous process of securing legislation or other governmental action beneficial to themselves, including by rearranging governmental power so that more of it resides at one level (e.g., with the electorate) and less at another (e.g., with local governmental officials), members of the majority may not pass a law depriving racial minorities of the benefits of the political process by subjecting minorities, but not themselves, to structural or other political disabilities. Such a law is not "grounded in

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6/ continued

Seattle's voluntarily adopted desegregation plan moots any need for court-ordered measures. On the other hand, under Penick and Wright, supra, Initiative 350 cannot finally be adjudged constitutional until after Phase II determines whether (i) the State of Washington or Seattle is under a continuing duty to desegregate the schools of Seattle, and (ii) whether the Initiative interferes with that duty. See North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971).

in neutral principle." Hunter v. Erickson, 393 U.S. at 395 (Harlan, J., concurring). By dividing the political process along racial lines, it cements into the political structure of the State the same "special condition" -- i.e., a "prejudice against discrete and insular minorities ... which tends to curtail the operation of the political process ordinarily to be relied upon to protect minorities," United States v. Carolene Products Co., supra, 304 U.S. at 152 n.4 -- whose existence justifies the Fourteenth Amendment's "extraordinary protection" of blacks and other minorities "from the majoritarian political process." San Antonio School Dist. v. Rodriquez, supra, 411 U.S. at 28.

The requirement that state political processes be racially neutral is no Fourteenth Amendment fellow traveler. It

is compelled by the same "basic principles," Hunter v. Erickson, 393 U.S. at 396 (Harlan, J., concurring), lying at the "core of the Fourteenth Amendment," id. at 391 (majority opinion), that demand that racial minorities be afforded the same right to vote, and the same level of political representation, as all other citizens. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 691-707 (9th Ed. 1975). Whatever other goals the Equal Protection Clause is designed to achieve, at the very least it demands "the prevention of meaningful and unjustified official distinctions based on race," and particularly those distinctions disadvantaging racial minorities in the political process. Hunter v. Erickson, supra, 393 U.S at 391.

C. Nyquist v. Lee

In Nyquist v. Lee, 401 U.S. 935 (1971), aff'g 318 F. Supp. 710 (W.D. N.Y. 1970), the Court reaffirmed these principles in a context involving the uneven, subject-matter-specific realignment of political power -- not, as in Hunter, between local municipal officials and the electorate, but between state and local public-school officials.

In New York (unlike in most American states, see Milliken v. Bradley, 418 U.S. 717, 742 & n.20 (1974)), authority over the public schools largely belongs to state, rather than local, education officials. Thus, the Board of Regents of the University of the State of New York, and its chief executive officer, the Commissioner of Education, have long had "the authority to order local school boards to act in accordance with state

educational policies formulated by the Board of Regents." Lee v. Nyquist, 318 F.Supp. at 719. As in Hunter, with regard to housing in Akron, the racial minorities before the Court in Lee had succeeded in the past in convincing these officials to adopt "a policy of eradicating de facto segregation" in the public schools of New York. Id. at 716.[7/] Despite "considerable local resistance," the Regents and Commissioner of Education enforced this policy by ordering local school boards to reassign students to assure racial balance in the schools. Id.

7/ "[S]chool authorities have wide discretion in formulating school policy, and ... as a matter of educational policy ... may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." North Carolina Board of Education v. Swann, 402 U.S. 31, 45 (1971); accord, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

The opponents of mandatory desegregation in New York secured legislation rescinding such orders. As in Hunter, however, this goal was not accomplished by simply reversing the same political process that minorities had previously used to secure state-imposed anti-segregative measures. Nor was it accomplished by generally rearranging the political process to make action by state education officials, including action beneficial to the victims of de facto segregation, more difficult to achieve, for instance by forcing state officials generally to share authority with local ones.

Instead, as in Hunter, the opponents of state-mandated desegregation adopted a subject-matter-specific law providing that any action regarding student assignment "on account of race, creed, color or

national origin" would require, in addition to the approval of state officials, "the express approval of a [local] board of education having jurisdiction, a majority of the members of such board having been elected ...."[8/] Lee v.

8/ As in Hunter, the law struck down in Lee on its face was racially neutral, since race-conscious reassignment of students to benefit whites was subjected to the same special hurdles as reassignment to benefit blacks. However, as in Hunter, see note 5, supra, the Lee Court recognized, given the statute's genesis in "local resistance" to past integrative student-assignment plans, that the statute effectively embodied an "explicitly racial classification" affording the educational interests of the black victims of de facto segregation less favorable treatment than the educational interests of all other citizens. Lee v. Nyquist, supra, 318 F. Supp. at 718. As in Hunter, the law was accordingly held unconstitutional irrespective of the motivation of its proponents. Id.

In view of Lee, and the other cases applying Hunter in school-segregation contexts, e.g., Evans v. Buchanan, 393 F. Supp. 428, 440-41 (D.Del.)(3-judge court), aff'd, 423 U.S. 963 (1975)(citing cases), the Government's suggestion that

Nyquist, supra, 318 F.Supp. at 712. While giving local officials authority over this

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8/ continued

the Fourteenth Amendment prohibition enunciated in Hunter is limited to non-neutral laws discouraging efforts to end de facto housing segregation, and does not apply to nonneutral laws discouraging efforts to end de facto school segregation, is ludicrous. E.g., Brief of the United States, at 17-18. See generally Columbus Board of Education v. Penick, 443 U.S. 449, 465 n.13 (1979)(citing cases) (noting the hand-in-glove relationship between housing and school segregation).

Indeed, the characteristic of efforts to end de facto school segregation on which the Government relies to distinguish this case from Hunter --i.e., that some minorities may not be benefited by such measures, Brief of the United States, at 17-18 -- applies equally in the housing context in Hunter. However, that not all minorities support open housing or integrated schooling does not undermine the conclusion in Hunter, Lee and below that a legislative classification burdening such supporters, but no other citizens, is unconstitutional because those whom it does disadvantage are minorities. Otherwise, for example, the Court's conclusion in Nixon v. Herndon, supra, that a "white Democratic primary" law unconstitutionally disadvantages blacks would be undermined by the fact that many blacks are Republicans, and have no desire to vote in the Democratic primary. See notes 2, 3, supra.

one aspect of educational policy[9/] -- of special interest to the racial minority victims of de facto segregation -- the law left the authority of state officials intact as to all other educational matters, including all other student-assignment matters.

As in Hunter, the Court in Lee found this law unconstitutional under the Fourteenth Amendment because the specific rearrangement of the political system chosen to accomplish the present rescission and future discouragement of

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9/ The law struck down in Lee actually realigned authority over student assignment to alleviate de facto segregation in two ways. In school districts governed by an elected school board, final authority rested with that board. In districts governed by an appointed school board, however, the law withdrew the authority to assign students to alleviate segregation from all (i.e., state and local) education officials, leaving it exclusively in the hands of the state legislature. See Lee v. Nyquist, supra, 318 F. Supp. at 719.

civil-rights-oriented benefits previously conferred on minorities was not racially neutral:

> [The statute] singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance. The Commissioner and local appointed officials [see note 9, supra] are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the Hunter principle.

318 F. Supp. at 719 (Hays, J.), aff'd, 401 U.S. 935 (1971).

Lee, like Hunter, lies at the "core" of the Fourteenth Amendment's "protection [of minorities] from the majoritarian

political process." San Antonio School Dist. v. Rodriquez, supra, 411 U.S. at 28. It too strikes down an effort by members of the majority to structure the political process so that the black victims of segregation are once again relegated to the historical position of "political powerlessness" vis a vis all other citizens that the Equal Protection Clause was particularly designed to remedy. Id.

D. Initiative 350

Initiative 350 is a mirror image of the law found unconstitutional in Nyquist v. Lee. Like that law, Initiative 350 was legislated in direct response to a plan (in this case "The Seattle Plan") of "mandatory" student reassignment to achieve greater interracial contact in the schools,[10/] only here the nonneutral

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10/ "Mandatory" is a misnomer. For the citizens of Seattle, through their elected

realignment of power runs from the local to the State level, rather than from the State to the local level, as in Lee.[11/]

In the State of Washington, as in most American jurisdictions (excepting New York), see Milliken v. Bradley, supra, 418 U.S. at 742 & n. 20, the authority to

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10/ continued

representatives on the school board of that district, voluntarily chose to reassign students in order to achieve a greater degree of racial balance. The mandate, that is, came not from a federal court or other agency not directly responsible to the citizens of Seattle, but from those citizens themselves. The term is accurate only in the sense that, as in virtually every public school system in the country, the student assignment plan in Seattle requires that students living in specified areas attend specified schools, rather than allowing each student voluntarily to choose the school he or she attends.

11/ The law in Lee realigned the political process in some districts in New York by removing authority from education officials generally and giving it to the State legislature. See note 9, supra. To this extent, Initiative 350 is an exact, rather than mirror, image of the law struck down in Lee.

operate the public schools and, specifically, to assign students to particular facilities, resides almost exclusively in local school boards. "The law [of Washington] has plainly vested the board of directors of school districts such as this with discretionary powers in such matters." State ex rel. Lukens v. Spokane School District 81, 147 Wash. 467, 474, 266 P. 189, 191 (1928). See Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996, 1010 (W.D. Wash. 1979) (Finding of Fact 8.2). As the Supreme Court of Washington has expressly held, the Seattle school board was free to adopt a mandatory integration program such as The Seattle Plan in the proper exercise of its broad discretionary power over student assignment. See Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 666

(Wash. 1972).[12/]

Although the Seattle Plan encountered opposition, its opponents did not seek to rescind the Plan through the pre-existing political process. Instead, they found it easier to rearrange that process through adoption of Initiative 350.[13/] 473 F. Supp. at 1006-07 (Findings of Fact 6.3, 7.1-7.5).

12/ In Palmason, the Supreme Court of Washington held, prior to the enactment of Initiative 350, that local school boards in Washington have almost plenary "discretionary power" over student assignments within their districts, subject only to judicial review to determine if such assignments "violate some fundamental right of the party challenging them." 495 P.2d at 660 & nn.3, 4. The Court concluded that a predecessor of "The Seattle Plan" violated no such right. Id. at 662-63.

13/ Previous attempts by opponents of desegregation to recall the pro-integration members of the Seattle school board had failed. 473 F. Supp. at 1006 (Finding of Fact 6.3), aff'd, 633 F.2d 1338, 1346 (9th Cir. 1980).

As in Hunter and Lee, however, the Washington voters who adopted the Initiative did not generally restructure the political process so that all comparable governmental action would be harder to secure in the future. Rather, using a subject-matter classification like those struck down in Hunter and Lee, Initiative 350 rescinded The Seattle Plan and prevented its duplication in the future by non-neutrally realigning the political structure of public education in Washington along lines corresponding to the race of the persons adversely affected. Under the Initiative, the minority victims of de facto school segregation could only secure governmental action relieving that condition from the State legislature or the State electorate at large, although all other citizens remained free to achieve

any other goal of public education or student assignment through local school boards.

The racial classification drawn by Initiative 350 is clear from the face of that provision. Under the Initiative, the citizens of Washington remain free, as before it was adopted, to secure from local school boards: (i) any governmental action affecting public education other than student assignment (Initiative 350, § 1), and any student-assignment action designed to (ii) utilize "the school nearest or next nearest to student's place of residence" (id.), or, regardless of the location of the school facility, to (iii) improve "the course of study" available to students (id.), (iv) provide "special education, care or guidance," including for "students who are physically, mentally

or emotionally handicapped" (id. §§ 1(1), (4)), (v) alleviate transportation difficulties, caused by "health or safety hazards, either natural or man-made, or physical barriers or obstacles, either natural or man-made" (id. § 1(2)), (vi) avoid attendance at facilities that are "unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (id. § 1(3)), or (vii) satisfy "most, if not all, of the major reasons for which students are at present assigned to schools other than the nearest or next nearest schools" except for desegregation (453 F. Supp. at 1010, Finding of Fact 8.3).[14/] As its proponents promised the voters of Washington,

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14/ Initiative 350 is not a neighborhood-school law. It leaves intact the local school board's broad discretion to define the curriculur, remedial, health, safety, transportation and space needs of its

Initiative 350 occasions "no loss of [local] school district flexibility other than in busing for desegregation purposes" (473 F. Supp. at 1008, Finding of Fact 7.18), and in no way affects the "99% of the school districts" in Washington (i.e., all but the three respondent districts) that are not now assigning or contemplating the assignment of students

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14/ continued

students, and to assign those students to schools other than those nearest or next nearest their place of residence, if it concludes that any of those needs will be better served by such assignments. Accordingly, even were a neighborhood-school policy compelling enough to justify what otherwise amounts to a constitutional violation -- but see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1, 28 (1971) -- Initiative 350 is designed to achieve no such policy, since as both courts below expressly found, it freely allows local school boards to ignore that goal whenever any educational interest other than racial integration is involved. 453 F. Supp. at 1010 (Finding of Fact 8.3), aff'd, 633 F.3d at 1344 & n.4.

to encourage interracial contact (id. at 1008-09, Finding of Fact 7.9).

Accordingly, the single class subjected by Initiative 350 to the extraordinary political burden of having to obtain statewide legislative or popular approval of local student-assignment proposals suiting its particular needs is composed exclusively of "the black students" in the State of Washington who are victimized by segregation in the public schools. Id. at 1007 (Finding of Fact 6.12), aff'd, 633 F.2d at 1342-44.[15/] Since, as in Hunter and Lee the disadvan-

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15/ The Courts below both found that black citizens living in segregatd neighborhoods in Washington believe that racial integration of the schools would benefit their children. Regardless of whether those citizens are right or wrong (see Section II, infra), the State of Washington may not constitutionally subject them to political hurdles, not applicable to other citizens, that impede their achievement of that goal. In short, the

taged class is defined by the race of its members, the law offends the Equal Protection Clause regardless of the motivation of its proponents.[16/]

15/ continued

social validity of racial integration is not at issue here. What is at issue is the right of black citizens to pursue that legitimate governmental objective through lawful political processes on the same basis as all other citizens are permitted to pursue their legitimate governmental ends.

16/ Much is made by appellants of the fact that the provisions in Hunter and Lee defined the forbidden subject-matter classification in terms of the subject-matter on which a special political burden was placed by the State (i.e., fair-housing regulation in Hunter and student reassignment to achieve integration in Lee), and accordingly used the word "race," while the drafters of Initiative 350 defined the subject-matter classification in terms of all of the subject matters on which the special political burden was not placed (i.e., every use of student reassignment save for integration), and thereby avoided using the word "race." However, it was not the wording of the laws in Hunter and Lee, or even any facial nonneutrality in that wording, that rendered those laws un-

To put it bluntly, members of the political majority in Washington have passed a law requiring racial minorities to seek statewide approval of govermental action on their behalf, while insisting that action on every one else's behalf need only secure the approval of local officials. As a result, the internal

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16/ continued

constitutional. As the Hunter Court noted, those laws on their faces "treat[ed] Negro and white, Jew and gentile in an identical matter." Hunter v. Erickson, supra, 393 U.S. at 391. The Court struck down the laws in Hunter and Lee because it was clear, once the "covert" statutory classifications they created were exposed (see Personnel Administration v. Feeney, 442 U.S. 256, 274 (1979)), that they separated persons for differential treatment along lines that corresponded exactly (rather than only approximately, as in, e.g., Feeney, supra; Village of Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252 (1977); Washington v. Davis 426 U.S. 229 (1976); and James v. Valtierra, 402 U.S. 137 (1971)) to the race of the persons adversely affected. It is in this sense that the offensive classifications were "explicitly racial," and thus

political processes governing public education in Washington are not organized "on the basis of any general principle," Hunter v. Erickson, supra, 393 U.S. at 395 (Harlan, J., concurring), and do not "treat[] all individuals as equals" regardless of race, Mobile v. Bolden, supra,

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16/ continued

unconstitutional, regardless of the motive for drawing them. Hunter v. Erickson, supra, 393 U.S at 389; see notes 5, 8, supra.

The classification drawn by Initiative 350 is nonneutral and explicitly racial in precisely the same way as the classifications struck down in Hunter and Lee. Indeed, as the district court's factfindings make clear, the classification drawn by Initiative 350 -- between minorities favoring mandatory student assignment to relieve them of racial isolation and all other persons seeking beneficial governmental action relating to education or student assignment -- is identical to the explicitly racial classification struck down in Lee. See 473 F. Supp. at 1008-09 (Findings of Fact 7.8, 7.9, 7.18, 7.19).

Put simply, it was the substance of the laws struck down in Hunter and Lee,

446 U.S. at 84 (Stevens, J., concurring). Rather, they deny the black victims of school segregation the same degree of political protection afforded all other citizens by the laws of the State. This, in its rawest form, is the denial of "the equal protection of the laws." It is unconstitutional under the Fourteenth Amendment.

16/ continued

and it is the identical substance of Initiative 350 -- the correspondence of the classification drawn to the race of the persons adversely affected -- rather than the form or specific wording of those provisions that (barring some compelling justification) render all three unconstitutional irrespective of the motivation of their drafters.

II

RACIAL INTEGRATION OF PUBLIC EDUCATION, WHICH INITIATIVE 350 NON-NEUTRALLY FRUSTRATES, IS A LEGITIMATE, INDEED PRESSING, POLITICAL OBJECTIVE OF BLACK CITIZENS IN APPELLEE SCHOOL DISTRICTS.

While white students often benefit from interracial association, e.g., Regents of the University of California v. Bakke, 438 U.S. 265, 314-15 (1978) (Powell, J.), the courts below found that the persons in fact disadvantaged by Initiative 350 were the black and other minority students living in segregated neighborhoods in appellee districts who, but for the enactment of the Initiative, would be assigned to racially integrated public schools. See 633 F.2d at 1343-44. The parents of these minority students believe that racially integrated public education in their school districts would benefit their children and, prior to

Initiative 350's enactment, convinced appellee disricts to pursue that objective in an effective manner. Regardless of whether these parents are right or wrong in their belief, the State of Washington may not constitutionally subject them, but no other citizens, to political hurdles that impede their achievement of legitimate governmental action consistent with those beliefs. See Part I, supra.

Moreover, there can be no question that it is a legitimate governmental objective for a local school district voluntarily to seek to desegregate its schools through "exercise of its discretionary power to assign students within [its] school system[]." McDaniel v. Barresi, 402 U.S. 39, 42 (1971). See note 7, supra. It is equally well established that "bus transportation [is] a normal and accepted tool of educational policy," Swann v.

Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29 (1971), which "has long been an integral part of all public educational systems," and that "it is unlikely that a truly effective [desegregation] remedy could be devised without continued reliance upon it." North Carolina Board of Education v. Swann, 402 U.S. 43, 46 (1971).[17/]

17/ In the last decade, the debate over school desegregation has often degenerated into a debate over "forced busing." The term "forced busing" is a misnomer. School districts do not force children to ride a bus, but only to arrive on time at their assigned schools. When that school is beyond walking distance -- for whatever reason -- parents not only do not object to busing, they insist on it, and have for many years. Thus, busing children to school doubled during the 1930s, grew by 70 percent in the 1940s, and increased by more than a third between 1960 and 1970. METROPOLITAN APPLIED RESEARCH CENTER, BUSING TASK FORCE FACT BOOK 22-24 (1972); HEW, National Center for Educational Statistics, Table, in G. ORFIELD, MUST WE BUS? 130 (1978). By 1969, prior to the advent of court-ordered mandatory racial balance plans in the wake of Alexander v. Holmes County Board of Education, 396 U.S.

Although apparently conceding its legitimacy as a governmental objective,

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17/ continued

19 (1969), almost 60 percent of all school-age children were transported to school. DEPARTMENT OF TRANSPORTATION, TRANSPORTATION CHARACTERISTICS OF SCHOOL CHILDREN 7, 10-15 (1972). Even today, over 97 percent of public-school busing is for purposes other than desegregation. The New York Times, Dec. 4, 1980, §1, at 25, Col. 1.

The parental demand for busing stems from the fact that riding a bus to school is substantially safer than walking. A study by the Pennsylvania Department of Education found that children who walk to school are in three times as much danger as those who ride the bus, while the National Safety Council reports that boys are three times, and girls two times, as likely to have an accident walking to school than if they ride in a bus. See U.S. COMMISSION ON CIVIL RIGHTS, PUBLIC KNOWLEDGE AND BUSING OPPOSITION 17 (1973). Other statistics establish that riding the bus is safer than riding in a car. Buses: Backbone of Urban Transit, The American City, Dec. 1974, at 23; NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, BUS FACTS 17 (39th ed. 1972). It is also safer to ride a bus to public school than to private school, primarily because private and parochial schools rely heavily on worn-out buses purchased from public school systems after years of use. School Bus Task Force, in 120 CONG. REC. 8757 (1974). Cf. G. ORFIELD, supra, at 129

the Government nevertheless questions the efficacy of school desegregation for black students, purportedly on the basis of social science data. Brief for the United

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17/ continued

(when a parent removes his child from a desegregated school and places the child in a private school, the length of the child's bus ride increases, on average, by 70 percent).

As is attested by the huge increase in busing over the last 50 years, busing per se does not have any negative educational effects. Nor is there any evidence that attending a school other than the one nearest the student's home negatively affects academic achievement or a school's social climate. Davis, Busing, in 2 R. CRAIN, et al., SOUTHERN SCHOOLS: AN EVALUATION OF THE EMERGENCY SCHOOL ASSISTANCE PROGRAM AND OF SCHOOL DESEGREGATION 118 (1973); Zoloth, The Impact of Busing on Student Achievement, 7 GROWTH & CHANGE 45 (July 1976).

In short, notwithstanding the focus of the opponents of mandatory desegregation on "forced busing," the social scientific literature unequivocally establishes that publically provided transportation to to schools is a safe, indeed necessary, component not only of desegregation efforts but, much more pervasively, of public education in general.

States, at pp. 38-39, n. 39.[18/] However, a recent comprehensive review of the social science literature on public school desegregation establishes that the educational opportunities and achievement of black and other minority students are substantially enhanced by the use of student assignment to achieve racial integragion. Hawley, "The False Premises of Anti-Busing Legislation," testimony before the Subcom. on Separation of Powers, Sen. Com. on the Judiciary, 97th Cong., 1st Sess. (September 30, 1981) (summarizing findings) (hereinafter "Hawley testimony"); W. HAWLEY, et al., 1 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF

18/ For the reasons set out in note 15, supra, this query by the Government is irrelevant here. Nonetheless, the suggestion that desegregation is not effective is so thoroughly inaccurate that amicus is compelled to respond.

SCHOOL DESEGRATION STRATEGIES, STRATEGIES FOR EFFECTIVE DESEGREGATION: A SYNTHESIS OF FINDINGS 17-50 (1981) (hereinafter "Synthesis"); C. ROSSELL, et al., 5 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES, A REVIEW OF THE EMPIRICAL RESEARCH ON DESEGREGATION: COMMUNITY RESPONSE, RACE RELATIONS, ACADEMIC ACHIEVEMENT AND RESEGREGATION (1981) (hereinafter "Review of Empirical Research"). For the convenience of the Court, copies of these materials, which synthesize the massive body of social science research concerning school districts undergoing actual sustained desegregation over the last 15 years, have been lodged with the Clerk's office.

Briefly stated, the social science review has found, inter alia, that:

1. The use of student assignment as a desegregation method has reduced racial isolation in every school system studied notwithstanding any "white flight."[19/]

2. Desegregation as a general rule cannot be accomplished effectively without using student assignment. "Voluntary" plans, which rely exclusively on student choice as to whether to be reassigned to a desegregated school or a "magnet" school program, have proven to be almost totally ineffective in reducing racial isolation.[20/]

3. Attending racially integrated

19/ Hawley testimony, at 2-9; Synthesis, at 17-34; Rossell, "The Effectiveness of Desegregation Plans in Reducing Racial Isolation, White Flight, and Achieving a Positive Community Response" in Review of Empirical Research, at 1-87.

20/ Id. Compare, e.g., Columbus Board of Education v. Penick, 443 U.S. 449, 459-60 (1979) (desegregation plans that do not involve student assignment have proven ineffective).

schools substantially -- often dramatically -- enhances the academic achievement of black students as revealed by commonly used achievement and I.Q. measures. Gains are greatest when integration starts in the earliest grades. The achievement levels of white students in integregated schools do not suffer, while race relations among all students improve.[21/]

As this research demonstrates, the goal of effective public-school integration is not only a proper governmental objective, but one that the blacks in appellee districts who desire it, and who are unconstitutionally burdened by Initiative 350 in achieving it, correctly perceive as crucial to their future well-being.

21/ Hawley testimony, at 10-13; Crain & Mahard, "Some Policy Implications of the Desegregation-Minority Achievement Literature" in Review of Empirical Research, at 172-208

CONCLUSION

The judgement of the Ninth Circuit should be affirmed.

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STATE OF WASHINGTON, *et al.*,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-9

STATE OF WASHINGTON, *et al.*,

Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION

INTEREST OF *AMICUS CURIAE*

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board, and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective governance and administration of the public schools, and to preserve the unique American tradition of local citizen control of schools, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its 41st year, National School Boards Association is the only major educational organization representing school boards and

their members. Its constituents are responsible for the education of more than 95 percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that the issue of school desegregation continues to be one of the most pressing in this country. In light of today's economic climate, it is important that every child, regardless of race, color, or national origin, be provided with an equal chance in the public schools of this country. If this Court were to find the Initiative that is the subject of this case to be constitutional, that decision could lead to similar legislative actions and constitutional interpretations in other states. Such a decision could threaten the ability of the nation's public school boards to ensure by proper administrative means that education is provided to all students without regard to race, color, or national origin and in a climate of cooperation, not coercion.

ISSUE PRESENTED FOR REVIEW

May fundamental constitutional guarantees, upheld voluntarily by elected public officials, be constrained by a law — Initiative 350 — that prohibits the assignment of students to nonneighborhood schools for desegregation purposes?

ARGUMENT

Introduction

National School Boards Association agrees fully with the constitutional arguments made by appellee, Seattle School District, and incorporates by reference the arguments set forth in the brief filed herein by appellees. Because the constitutional issues are fully briefed by those appellees, *Amicus* will address

the broader and important policy questions presented by this case.

Since 1954, in the landmark case of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), hundreds of school districts have been *ordered* by courts to take action to desegregate their schools. In virtually every case, the action has been met with at least some adverse community reaction. On many occasions, the court has been left with no alternative but to develop a plan of its own. *See, e.g., Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Citizens, courts, and the federal government have argued over the years that local school districts should be left to themselves to effect the management decisions that result in the desegregation of their schools. Who is in a better position than the locally selected and accountable school board to call in the members of the community to discuss an issue that affects all of the community? Who is in a better position to organize citizen involvement in developing alternative assignment plans? Who is in a better position to ensure that teachers and administrators are trained to deal with the myriad problems entailed in the development of an effective desegregation effort?

Most importantly, who better than the school board is in a position to ensure that the desegregation effort *works* and is not merely an antagonizing and futile exercise.

The real and troubling question contained in the legal arguments over Initiative 350 is whether fundamental constitutional guarantees, upheld voluntarily by elected public officials, may be constrained by state laws enacted in the heat of popular sentiment to limit traditional local discretion. Clearly, no such limit can be tolerated.

In sum, this now is the situation before this Court: A conscientious school board, recognizing an evil that demanded redress, sought to afford that redress, and did so without prodding of the courts. It now finds its effort thwarted by an initiative

that, from the start, was intended to destroy the voluntary desegregation plan — and its manifest advantages — and force the board to wait to be sued to redress the wrong it sought itself to remedy.

The Seattle school board, like most of its 16,000 or so counterparts in the United States, is not a perfect institution. Nevertheless, it took agressive action of its own volition to desegregate its schools.

Seattle's voluntary plan, drawn up after considerable consultation with citizens, community leaders, and interest groups, was less than perfect — a fact acknowledged candidly enough by the appellee itself. Yet this imperfect plan has ended racial imbalances in the community's public schools over the past four years and in the editorial view of the Seattle Times (March 16, 1981), it has "forestalled the threat of federal court intervention in local school district affairs." Moreover, the Seattle board, which sought to avoid the adverse consequences of court-ordered desegregation — perhaps taking a lesson from such contemporaries as the Boston School Committee — now finds itself being told by the State of Washington, and also by an inconsistent *federal* government, that it may not solve its problems by itself. Indeed, it must wait to be *sued* to do so. Only then — and presumably after years of wrenching community upheaval and expensive litigation diverting resources and attention from education, if modern history is to be a guide — will a plan be ordered by the courts. That such a proposition defies all logic is self-evident.

Voluntary Plans Work Better Than Mandated Plans

The Seattle school board directed its superintendent and staff to seek cooperation from all quarters in planning and implementing its voluntary desegregation effort. These administrators, in turn, worked closely with principals and teachers, among others. This network of cooperation, which has proved

successful in implementing many new programs in school districts because it encourages the active involvement of those most closely affected, may be expected to neutralize if not defeat the predictable efforts of those who organize to thwart a school district's desegregation plan. History in other communities has shown that this process, if not employed on behalf of equality, will be used *against* a desegregation plan.

Should the direct participants in the schools first be incited to work as a team *against* desegregation, which often happens when desegregation plans must be imposed by the courts, little chance remains that the team can be prompted to change sides to work effectively and willingly *for* successful desegregation. The foresight of the Seattle board in attempting to ensure a cooperative and voluntary desegregation plan and eliminate the need for judicial intervention now is rewarded by a posture of the State of Washington that says effectively that (1) a school system can be resegregated by popular will in defiance of civil rights statutes and Constitutional prerogatives and (2) that nothing *less* than a court order can desegregate the public schools in the state.

A statement to the Seattle Times of October, 1981, by the leader of the group that sponsored Initiative 350 belies appellant's contention that the referendum is racially neutral and not directed toward desegregation, and, in fact, argues that the will of the majority can override any Constitutional guarantee: "the people . . . have the right, through the ballot box, to express their judgment on desegregation, or for that matter, any similarly sensitive subject." Under such logic, couldn't slavery therefore be reviewed and presumably reinstated by popular referendum or universal suffrage discharged?

Equally preposterous is any contention that Seattle, or any other school district, is better off waiting to be sued before it acts to desegregate its schools. Should Initiative 350 be validated by the Court, the Seattle school board, once it *is* sued,

either will be forced to fight in court against that future plaintiff or to acquiesce and sign a consent agreement that would be made an order of the court. Should the latter alternative be chosen, it would allow no time for the gradual development of support for the desegregation effort, which already is under way in Seattle, and would aggravate the community strife that often accompanies court-ordered desegregation.

That such strife will follow *any* plan is probable. Evidence abounds that shows many parents oppose the transfer of their children from nearby schools for purposes of desegregation. *Amicus curiae* by no means asserts, therefore, that the Seattle voluntary desegregation plan was — nor is any school board's voluntary desegregation plan likely to be — "voluntary" on the part of parents. *Amicus* argues, rather, that a desegregation effort handled voluntarily and cooperatively, with the full participation of the local school board, administrators, teachers, and community leaders, is invested with the potent opportunity of ensuring that the community understands why the action is being taken and is given reason to believe that it has contributed to the plan and stands to lose if the plan fails.

Initiative 350 prohibits such voluntary action by the school board not only in situations where segregation is unintentional (and, thus, presumably exempt from a court order), but also extends its prohibition to *any* reassignment of pupils for desegregation purposes — *a crucial distinction and one misstated by the federal government in its brief.* In other words, the Initiative's prohibition applies even in cases wherein the school board concedes, publicly or privately, that the segregation was or might well have been caused intentionally by the actions of that board or a previous board. Consequently, Initiative 350 prohibits a school board from taking action to undo unlawful and unjust racial segregation *and* from heading off the lawsuit that inevitably will result from such injustice.

Failure To Take Local Action Invites Judicial Intervention

Initiative 350, far from ensuring that desegregation lawsuits will not be visited upon the school boards of the state of Washington, ensures that the courts *will* be called upon to redress grievances that might have been settled voluntarily, locally, and non-judicially. Surely both the State of Washington and the federal government know from recent history if not from common sense that, in a society such as ours, a grievance not resolved at a lower level will seek redress at a higher one, that a resolution will be imposed from above, and that the effect of that resolution will be more pervasive than would have been the case had the matter been settled at the lower level in the first place.

If local school boards in Topeka and elsewhere had not carried on *de jure* school segregation or had moved to correct it in the early fifties, what need would there have been for the *Brown* decision and its wrenching consequences?

If local school boards in Des Moines and elsewhere had acted to protect and promote the constitutionally guaranteed rights of Americans, rather than to curtail them, what need would there have been for the *Tinker*[1] decision and the severe restrictions it placed upon prerogatives of school boards?

If local school boards in Ohio and Arkansas and elsewhere had recognized that due process is a right not to be denied Americans, would there have been any need for the *Goss*[2] or *Wood*[3] decisions that place school board members and school administrators in danger of having to pay *personal* damages for violating the constitutional rights of their students?

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[1] Tinker v. Des Moines Comm. School Dist., 393 U.S. 503 (1969).

[2] Goss v. Lopez, 419 U.S. 565 (1975).

[3] Wood v. Strickland, 420 U.S. 308 (1975).

If local school boards everywhere had moved to eradicate sex discrimination from their school systems, what need would there have been for the federal government to impose Title IX regulations upon them?

The Seattle school board, seeking to avoid the errors of its counterparts, and hoping to obviate the consequent risk of profoundly pervasive judicial remedy, now finds itself thwarted and faced with having to wait to be haled into court.

As if the specter of such pervasive judicial remedy were not enough to establish the desirability of voluntary desegregation plans, then the need to gain the time afforded by voluntary plans ought to be. As the Court is well aware, the process of school desegregation involves a great deal more than merely moving students from school to school. In addition to the myriad technical details of the process, a vital need exists for preparation for the social phenomena of desegregation and especially for maintaining or improving the quality of education as desegregation occurs. Reassigned teachers need training in human relations and intercultural understanding. Many also need in-service training to improve their teaching skills. Some transferred students need remedial education. Curriculum revision, instructional materials, teacher aides, and guidance and counseling all might be needed to maintain the quality of education. And, of course, waiting in the wings of any desegregation effort is the potential villain — "white flight."

No sophisticated research is required to conclude that the complex task of desegregation can best be accomplished by a school board that has adopted a plan of its own and in which it has invested its own integrity. More importantly, a school board, with a minimum of disruption and reassignments, might avoid serious future segregation — if it identifies the problem early *and is free to act voluntarily to resolve it*. If a school board is forced, as Initiative 350 requires, to wait for a court order and the divisiveness resulting from lawsuits, the problem might no longer be soluble.

The Role Of The Federal Government

Originally, the federal government, through the Department of Justice, intervened in this case as a Plaintiff Intervenor on the side of the Seattle school board in its challenge to the constitutionality of Initiative 350. Recently, after a change in Administrations, the federal government has chosen to reverse its position and now has filed a brief arguing that Initiative 350 is constitutional.

Ironically, the Administration that has reversed the position of the federal government in the case, now having it favor Initiative 350, is the same that has been, and is, dramatically reducing the federal role in education by massive cuts in funding and by urging *voluntary, local solutions to problems besetting American society. See,* Address of the President to the New York Partnership, Incorporated Luncheon, January 14, 1982. The effect of the federal government's new position in this case is to ensure exactly the opposite. If Initiative 350 stands before this court, the local Seattle school board will be forced to wait for a federal court to enter an order *mandating* a desegregation plan. If the Initiative falls before this Court, the local Seattle board will be free to continue with its voluntarily adopted local plan. Effectively, the federal government, in its zeal to placate the opponents of busing at the risk of resegregating Seattle's schools, now is arguing for court-*ordered* desegregation.

This is a newly adopted position of the Executive. It flies in the face of the federal government's history of promoting voluntary, as opposed to forced, solutions — even as to "unintentional" segregation. Witness former President Nixon's message to Congress on May 21, 1970, in support of the Emergency School Assistance Act of 1970, which the Nixon Administration had designed to assist local school districts in desegregating their schools. Wrote Mr. Nixon:

> The educational effects of racial isolation, however, are not confined to those districts that previously operated

> dual systems. In most of our large cities, and in many smaller communities, housing patterns have produced racial separation in the schools which, in turn, has had an adverse effect on the education of the children. It is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist the local school districts in attempting to overcome its effects.
>
> In some cases this can best be done by reducing or eliminating the isolation itself. . . . this Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education — not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

President Nixon's message then outlined specific provisions of the Act designed to assist local school districts in eliminating *de facto* as well as *de jure* segregation. Wrote the President:

> [O]ur goal is a system in which education throughout the nation is both equal and excellent, and in which barriers cease to exist. This does not mean imposing an arbitrary "racial balance" throughout the nation's school systems. But it should mean aiding and *encouraging voluntary efforts* by communities which seek to promote a greater degree of racial integration, and to undo the educational effects of racial isolation. (Emphasis supplied.)

The Emergency School Aid Act was passed by the Congress and, with revisions, has been extended to this date. 20 U.S.C. §§ 3191 *et seq.*

The Function Of Local School Boards

The federal government and the State of Washington argue that Washington — *unlike* other states — enjoys complete authority to enact whatever education policies it deems advisable. Initiative 350 is said to be merely an extension of that state

power and not an unusual departure from the norm. They argue that Washington is "unique" because its state legislature and state department of education have control of the education policies of local school boards.

However, the unusual characteristic of Washington, if any, does not relate to policy-making. As a result of school funding decisions, the legislature passed a school financing statute which was intended to result in the bulk of the funding for "basic education" to be taken over by the state through a state-wide formula of block grants. The law also included a 10% lid on the amount of property taxes which could be levied by a school district. Were the original concept of that legislation to have been implemented, at least the school financing system in Washington could have been said to be "unique."

But — state funding for education amounts to only 55% and each year the legislature lifts the lid on local levies to allow school districts to make up the difference. Therefore, in practice even the financing of school districts in Washington is not unique.

Further, like the rest of the 50 states, save Hawaii, education policy-making in Washington is reserved to the local school districts.

Even the school financing statute, Washington Basic Education Act, Ch. 359, 1977 Wash. Laws, 1st Ex. Sess., *amended by* ch. 250, 1979 Wash. Laws., 1st Ex. Sess., which amounts to a mere fraction of Washington school legislation, was passed with great deference to local control, as a few excerpts from the legislative history will show:

> Senator Bottiger: "Would Senator McDermott yield to another question? Senator McDermott, I sent you the materials on the plan used by the Franklin-Pierce school district of interims and programs of that nature and asked you whether this bill would prevent a school district from

using that kind of innovative program. They have one month a year where the children are offered two courses which they take intensive study. In other words, in the morning they take one class; in the afternoon they take another. Is that kind of program prohibited by this bill?

Senator McDermott [Chairman of Senate's Education Committee; floor leader for the Basic Education Act in the Senate]: "Senator Bottiger, *we have tried to write a bill that was flexible for the local districts to make any program that made sense to them for their children.*"

"In addition, this bill does not have an effective date until the first of September, 1978, which means that Superintendent Brouillet will have time to do a survey to find out if there is any district in the state where we have precluded them from any kind of innovative program. The reason of setting the effective date at that point was to give us time to make sure that *we haven't in any way taken away local control of how the hours are distributed or how the programs are offered in the local school districts.* So, there is no intention to bind the hands of any district like Franklin-Pierce that has really a very excellent program in area work skills."

Journal of the Senate, 45th Wash. Leg., Vol. I, at 1184 (April 21, 1977) (emphasis added).

Senator McDermott (responding to point of inquiry: "Senator Clarke raises the question of whether or not we are saying that there must be a one to twenty ratio of teachers to students in the classroom. That is not the intention of this provision. It is merely to say we will provide enough money for fifty teachers, certified people, for every one thousand children. *We left to the local district the decision as to whether that means forty teachers in the classroom, or forty-five, or thirty-five and the rest administrators. That kind of decision we felt was best left at the local level.*

Id. at 1185-86 (emphasis added).

> Senator Mardesich: "Would Senator McDermott yield to a question? Senator McDermott, on page 8, section 5, line 29 of the bill, there is language reading, 'PROVIDED, That by the third year following the effective date of this 1977 amendatory act, the ratios included in the formula shall reflect not less than fifty certificated personnel to one thousand students and one classified personnel to three certified personnel.' *Is it the intent of that language, as incorporated by the committee, and in the bill now on the floor, in any way mandate that class size as related to that ratio, whether for the funding of that basic education or all education in either event?* Could I have a 'yes' or 'no', please?
>
> Senator McDermott: "The answer to your question is 'no'."

Id. at 1186 (emphasis added).

> Senator Grant: "Would Senator McDermott yield? Senator McDermott, I am looking at page 5, the definition of compensation. I see that you have defined it as one hundred and seven percent of the average salary of a certificated and one hundred and fourteen percent of the average salary for classified personnel. Now, how did you arrive at that seven and fourteen percent figure? What is included? Exactly what is included as far as benefits in that seven and fourteen percent?
>
> Senator McDermott: "Senator Grant, there are several ways to define something. One way is to be specific about it and another way is to leave local control and put out a specific amount of money and *let the local districts use that money for a benefit package of their choosing. Historically in this state, the benefit package has been decided at the local level,* and we chose to define compensation as the amount of money that is presently in the budget and has been historically in the budget; that is, seven percent for certified people and fourteen percent for the classified people. *There is a great diversity of benefit packages out in*

the districts and it is impossible to say what every district uses that money for.

* * * *

Senator Grant: ". . . *So what about health insurance and dental plans?*"

Senator McDermott: "*That sort of thing differs from district to district. It certainly is included in various districts. Senator Grant, the money could be used for any kind of health and welfare kind of program. We do not specify, we never have specified, we have always given the money to the districts and let them do as they choose.*

Id., Vol. II, at 2871-72 (June 19, 1977) (emphasis added).

The constitutions of all 50 states provide for the *potential* power of state legislatures and state departments of education to render decisions pertaining to the educational endeavors of the local school districts. Only the state of Hawaii has chosen to operate under a single statewide school district. The remaining 49 states divide their states into local school districts, with boundaries that may be changed by the state. Furthermore, *every* state legislature (that of the State of Washington included) reserves *potential* power to render even the most minute decisions regarding the operation and management of local public schools, decisions pertaining to building assignments for students, teacher assignments, school closings, and the like. That such power rarely is exercised at the state level — save for the promulgation of general policies and guidelines — is the result of common sense and historical precedent. Longstanding experience demonstrates that decisions such as these are best rendered at the local level.

The American tradition of *local citizen* control of public education dates back to the Colonial days. In 1647, the Massachusetts Bay Colony required larger towns to create and maintain schools. The colonists themselves decided all school-related matters at the town meeting.

With the ratification of the United States Constitution, all legal responsibilities of public education effectively were left to the states, not to the federal government. The powers of providing free and compulsory education in elementary and secondary schools are delegated by 49 of the 50 states to *local school boards*. That has been the case in Washington since it was a territory.

The structure of the educational system in Washington parallels the general pattern of organization found in most other states. The appendix illustrates this by comparing Washington laws to those in a number of her sister states, including those which this Court has labelled as reflecting state control. *E.g.*, *Milliken* v. *Bradley (I)*, 418 U.S. 717 (1974) (Michigan); *Swann* v. *Charlotte-Mechlenburg Board of Education*, 402 U.S. 1 (1971) (North Carolina); *Brown* v. *Board of Education, (II)*, 349 U.S. 294 (1955) (Delaware, Kansas, South Carolina, and Virginia).

Each state, including Washington, divides the power to educate among a state board of education, a state superintendent, and local boards of education. Washington and Arizona are unique among the states specifically examined because the *local* boards are expressly included in a general statute that divides the educational authority. The Washington statute provides that "[t]he administration of the public school system shall be entrusted *to such state and local officials, boards, and committees* as the state constitution and the laws of the state shall provide." *Wash. Rev. Code* 28A.02.020 (emphasis added). Thus, Washington law envisions that the local boards of education shall have the power to deal with local matters, at least as far as other more specific statutes provide.

The specific powers of local boards in Washington are defined in *Wash. Rev. Code* 28A.58 and 28A.59. Like many other states, Washington reserves the possibility of limits on a local

board's latitude and discretion. However, initial control of local educational concerns is with the local boards in Washington, and in practice effective control remains at the local level.

It is difficult to generalize as to whether a specific area is within local control or state control as no state grants absolute power to its local boards. In each of these states, the state board or the legislature retains a general supervisory power and the power to determine general policy and goals. Even in Illinois, where the local boards have considerable power, the legislature often regulates by law specific areas that otherwise would be considered within the realm of the local boards.[4] *E.g., Ill. Rev. Stat.* § 11-1414 (Cum. Supp. 1981) (regulates the flashing light warning system on school buses and the method for loading and unloading students).

Before Initiative 350 was passed, it was beyond dispute that local school districts in Washington were solely responsible for creating and revising intradistrict attendance zones, regardless of the policies guiding such decisions. For example, in *State ex rel. Citizens Against Mandatory Busing* v. *Brooks*, 80 Wn.2d 121, 492 P.2d 536 (1972), the Washington Supreme Court held that plaintiffs' request for a recall election due to their dissatisfaction with the Seattle board's first mandatory busing plan would not be proper because the members of the board were acting within their lawful discretion. Further in *Citizens Against Mandatory Busing* v. *Palmason*, 80 Wn.2d 445, 495 P.2d 657 (1972), the state supreme court overturned a lower court's injunction against implementation of the mandatory busing plan in Seattle. After careful analysis, the supreme court concluded that the local board had the requisite power and acted properly in devising the plan. Thus, regardless of any formal

[4] Ironically, in Illinois the state legislature and the state board of education have imposed a duty on local boards to consider the elimination of segregation in creating or revising attendance units. Ill. Rev. Stat. § 10.21.3.

reservation of state power to supervise local boards of education, which is true in all states, local boards in Washington *in fact* and in practice were responsible for student assignment and for devising and implementing desegregation plans within their districts. Consequently, the Court of Appeals was quite correct when it spoke of "a state-wide majority *** usurp[ing] *traditional* local authority over school board educational policies." 633 F.2d at 1344 (emphasis added).

CONCLUSION

If control over education is to be retained at its most effective level, final decision making must stay with representative school boards. *Through school boards, taxpayers are assured of a direct channel for influencing school policy.*

Genuine involvement of teachers, students, parents, and civic groups in the development of school district policy is the best way to ensure harmony within the community and to gain broad-based support for decisions made. But it properly remains the school board's function to assess the opinions of the various interest groups, and then to establish the policies and programs which in the board's best judgment meet the unique needs of the children.

On January 14 the President of the United States addressed the New York Partnership, Incorporated luncheon in New York City on the subject of voluntary action to resolve local problems in the community. Mr. Reagan's remarks belie the position taken by his Administration in this case.

> The key to rebuilding communities is individual initiative, leadership, personal responsibility . . .
>
> Only when the human spirit is allowed to invent and create, only when individuals are given a personal stake in deciding their destiny, in benefitting from their own risks, only then can society remain alive, prosperous, progressive and free . . .

> We want to see community partnerships between the private and public sector in every community in America . . .
>
> Community groups are part and parcel of our national heritage. They respond to our desire for cooperation, sympathy, teamwork and brotherhood. They help to shape our lives. They are close to the problems we face and they can best find the solutions we seek.

School desegration is one of the most important issues for communities and school boards. The solutions to the problems created by segregation are difficult enough if school boards take them on voluntarily in a general positive spirit. If voluntary desegregation is foreclosed to local school boards, those problems will be increased a hundredfold. The National School Boards Association urges this Court to preserve for local school boards the tools to assure equal opportunity. Not all school districts have the foresight and courage to do what the Seattle school district did in this case. But — where school boards take on the task of voluntarily desegregating their schools, the public and the courts owe a moral and constitutional duty to those boards to support their efforts.

Respectfully submitted,

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APPENDIX

Constitutional Language Creating School System:

Washington	"The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. . . ." *Wash. Const.* Art. IX, Sec. 2.
Arizona	"The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, and a university. . . ." *Ariz. Const.* Art. XI, Sec. 1.
Colorado	"The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state. . . ." *Colo. Const.* Art. IX, Sec. 2.
Delaware	"The General Assembly shall provide for the establishment and maintenance of a general and efficient system of full public schools. . . ." *Del. Const.* Art. 10, § 1.
Illinois	"The State shall provide for an efficient system of high quality public education institutions and services. . . ." *Ill. Const.* Art. X, Sec. 1.
Kansas	"The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools. . . ." *Kan. Const.* Art. 6, § 1.
Maryland	"The General Assembly . . . shall by law establish throughout the State a thorough and efficient System of Free Public Schools. . . ." *Md. Const.* Art. VIII, Sec. 1.

Michigan	"The legislature shall maintain and support a system of full public . . . schools as defined by law." *Michigan Const.* Art. 8, § 2, cl.1.
Minnesota	"The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools.. . ." *Minn. Const.* Art. XII, Sec. 1.
New Jersey	"The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools.. . ." *N.J. Const.* Art. VIII, Sec. 4, Para 1.
North Carolina	"The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." *N.C. Const.* Art. 9, § 2.
South Carolina	"The General Assembly shall provide for the maintenance and support of a system of full public schools open to all children in the State and shall establish, organize and support such other public institutions of learning as may be desirable." *S.C. Const.* Art. 11, § 3.
Virginia	"The General Assembly shall provide for a system of free public [schools] . . . and shall seek to ensure that an educational program of high quality is established and continually maintained." *Va. Const.* Art. VIII, Sec. 1.

Language Assigning Power Over Schools:

Washington	"The administration of the public school system shall be entrusted to *such state and local officials, boards* and committees as the state Constitution and the laws of the state shall provide." *Wash. Rev. Code* 28A.02.020 (1974) (emphasis added).

Arizona	"The general conduct and supervision of the public school system shall be vested in a State Board of Education, a State Superintendent of Public Instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law." *Ariz. Const.* Art. XI, Sec. 2.
Colorado	"The general supervision of the public schools of the state shall be vested in a board of education whose powers and duties shall be as now or hereafter prescribed by law. . . ." *Colo. Const.* Art. IX, Sec. 1.
Delaware	"The general administration and supervision of the free public schools and of the educational interests of the State shall be vested in a State Board of Education. . . ." *Del. Code. Ann.* tit. 14 § 101 (1978).
Illinois	"The [State] Board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. . . ." *Ill. Const.* Art. X, Sec. 2., Para. a.
Kansas	"The legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state. . . ." *Kans. Const.* Art. 6, § 2, para. a.
Maryland	The Department of Education has authority over the "general care and supervision of public elementary and secondary education." *Md. Ann. Code.* § 2-106 (Cum. Supp. 1981).
Michigan	"Leadership and general supervision over all public education . . . is vested in a state board of education." *Mich. Const.* Art. 8, § 3, para. 1.

Minnesota	The State Board of Education "shall exercise general supervision over public schools. . . ." *Minn. Gen. Stat.* § 121.11(7) (Cum. Supp. 1981).
New Jersey	"The general supervision and control of public education . . . shall be vested in the state boards. . . ." *N.J. Stat. Ann.* § 18A: 4-10 (1978).
North Carolina	"The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support. . . ." *N.C. Const.* Art. 9, § 5.
South Carolina	No comparable provision.
Virginia	"The general supervision of the school system shall be vested in a Board of Education. . . ." *Va. Const.* Art. VIII, Sec. 4.

Grant Of Power To State Board Of Education

Washington	The state board is given the power to, among other things, determine the curriculum, establish requirements for teacher certification, and promote the interests of the common schools. *Wash. Rev. Code* 28A.04.121 (1981).
Arizona	The state board is created by *Ariz. Const.* Art. XI, Sec. 3. It is given the power to define the curriculum, exercise general supervision over schools and graduation requirements, devise uniform evaluations, and set teacher certification requirements, among other things. *Ariz. Gen. Stat.* § 15-502 (Cum. Supp. 1981).
Colorado	The state board must exercise general supervisory powers, plan education budget, set certification requirements for teachers, and appraise the quality of the public school system, among other things. *Colo. Gen. Stat.* § 22-2-107, 2-109, 7-103 (Cum. Supp. 1981).

Delaware	The state board of education shall determine the educational policy of the state. *Del. Code Ann.*, tit. 14 § 121 (1978). In addition, the board has the power to adopt rules and regulations governing teacher certification, minimum course study, and textbook selection, among other things. *Id.* § 122 (1978 & Cum. Supp. 1981).
Illinois	"The [State] Board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. . . ." *Ill. Const.* Art. X, Sec. 2, Para. a.
Kansas	Among other powers, the state board is given the authority to set the course of study, accredit schools and certify teachers. *Kan. Stat. Ann.* § 72-7513 (1980).
Maryland	The State Board of Education has, among other things, the power to determine educational policy, set guidelines for instruction, and determine professional needs. *Md. Code Ann.* § 2-205 (Cum. Supp. 1981).
Michigan	The state board shall supervise and advise local school districts on textbook selection and curriculum development. *Mich. Stat. Ann.* § 1158 (Cum. supp. 1981).
Minnesota	"The board shall establish rules relating to examinations, reports, . . . courses of study . . . in connection with [public] schools applying for special state aid." *Minn. Gen. Stat.* § 121.11(7) (Cum. Supp. 1981).
New Jersey	The state board shall formulate plans, make rules to implement policy, and have incidental power necessary to fulfill its duty. *N.J. Stat. Ann.* § 18A:4-10-4-16 (Cum. Supp. 1981).

North Carolina — The state board is created by *N.C. Const.* Art. 9, § 4. The board is given the power to approve the course of study, adopt textbooks, set salaries, and appropriate the financial resources of the state, among other things. *N.C. Gen. Stat.* § 115C-12 (Cum. Supp. 1981).

South Carolina — The state board education is created by *S.C. Const.* Art. 11 § 1. The board is given the powers to set the course of study, select texts, adopt minimum standards of performance, and to adopt rules and policies for the governance of the public schools. *S.C. Code* § 59-5-60 (1978).

Virginia — The school board shall set standards of quality, approve textbooks, and set educational policy. *Va. Code Ann.* § 22.1-8 (1978).

Grant Of Power To State Superintendent

Washington — The office of superintendent of public instruction is charged with power to supervise all matters pertaining to the public school of the state. *Wash. Rev. Code* 28A.03.030 (1981).

Arizona — The office is created by *Ariz. Const.* Art. XI, Sec. 4. The state superintendent of Public Instruction has the power to generally supervise all public schools and to direct the work of all board employees, along with numerous other more specific duties. *Ariz. Gen. Stat.* § 5-121-22 (Cum. Supp. 1981).

Colorado — A commissioner of education is created by *Colo. Const.* Art. IX, Sec. 1, Para. 2. The commissioner is the chief state school officer and is given broad authority to implement education policy. *Colo. Gen. stat.* § 22-2-112 (Cum. Supp. 1981).

Delaware	"The Board shall prescribe the duties of the Superintendent of Public Instruction and shall invest him with such powers as it deems proper. . . ." *Del. Code Ann.* tit. 14 § 121 (1978).
Illinois	"The State Board of Education shall appoint a chief state educational officer." *Ill. Const.* Art. X, Sec. 2, Para 6.
Kansas	"The State Commissioner of education is created by *Kan. Const.* Art 6, § 4. The state board of education is given the authority to set the duties of the commissioner." *Kan. Stat. Ann.* § 72-7601 (Cum. Supp. 1980).
Maryland	The State Superintendent has the power to implement educational policies, certify teachers, and approve building plans. *Md. Code Ann.* § 2-303 (Cum. Supp. 1981).
Michigan	"The state board of education shall appoint a superintendent of public instruction. . . . He shall be the chairman of the board . . . and shall be responsible for the execution of its policies." *Mich. Const.* Art. 8, § 3, ¶ 2.
Minnesota	"The State Commissioner has the power to administer all laws and rules promulgated by the state board. *Minn. Gen. Stat.* § 121.09 (Cum. Supp. 1981).
New Jersey	Among other things, the state commissioner may prescribe minimum courses of study, subject to board approval. *N.J. Stat. Ann.* § 18A:4-25 (1978).
North Carolina	The Superintendent of Public Instruction has the duty to administer the instructional policies that are established by the State Board of Education. *N.C. Gen. Stat.* § 115c-21 (Cum. Supp. 1981).

South Carolina	The State Superintendent of Education shall be the chief administrator of the public schools. *S.C. Const.* Art. 11, § 2. The Superintendent is charged with administering the policies adopted by the state department of education. *S.C. Code* § 59-3-30 (1978).
Virginia	The Superintendent of Public Instruction shall have such powers as are prescribed by law. *Va. Const.* Art. VIII, Sec. 6.

Grant Of Power To Local Boards Of Education

Washington	RCW 28A.58 and 28A.59 define the specific power of local boards. The power includes the right to prescribe a course of study consistent with that planned by the state board. *Wash. Rev. Code* 28A.59.180(5) (1981).
Arizona	The local boards has the power to enforce the course of study selected by the state board, choose textbooks, make rules for student discipline, and maintain school property. *Ariz. Gen. Stat.* § 15-442-43 (Cum. Supp. 1981).
Colorado	Local school boards have "control of instruction" in the public school of their district. *Colo. Const.* Art. IX, Sec. 15. They have the statutory power to define the educational program to be offered, along with numerous specific powers. *Colo. Gen. Stat.* § 22-32-109-110 (Cum. Supp. 1981).
Delaware	The local school boards may select texts, set educational policy and adopt courses of study, in accordance with the rules and regulations promulgated by the State board of education. *Del. Code Ann.* tit. 14 § 1049 (1978).
Illinois	The local boards have broad power to decide upon course of study, choose texts, and set testing standards, among other things. *Ill. Rev. Stat.* § 10-20-1-30, 10-21.1-.6 (Cum. Supp. 1981).

Kansas	"Local public schools under the general supervision of the state board of education shall be maintained, developed, and operated by locally elected boards." *Kan. Const.* Art. 6, § 5. The board in each district has the power to set the course of study, adopt teaching standards, and select texts, subject to the approval of the state board. *Kan. State. Ann.* § 72-8205 (1980).
Maryland	"Educational matters that affect the counties shall be under the control of a county board of education. . . ." *Md. Code Ann.* § 4-101 (Cum. Supp. 1981). Each county board must "carry out the . . . policies of the State board." Id. § 4-107.
Michigan	*Mich. Stat. Ann.* §§ 380.1201-1347 (Cum. Supp. 1981) provide numerous specific directives to the local boards including the right to establish attendance zones within each district. *Id.* § 320.1283.
Minnesota	"The care, management and control of a common district is vested in a board of three members to be known as the school board." *Minn. Gen. Stat.* § 123.12 (1978).
New Jersey	"The schools of each school district shall be conducted by . . . a board of education. . . ." *N.J. Stat. Ann.* § 18A:10-1 (1978). The local boards must enforce the rules of the state board, and may make rules not inconsistent with those of the state board. *Id.* § 19A:11-1.
North Carolina	"All powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official, are conferred and imposed upon local boards of education. Said boards of education shall have general control and supervision of all matters pertaining to the public schools in their respective

	administrative units and they shall enforce the school law in their respective units." *N.C. Gen. Stat.* § *115C-36* (Cum. Supp. 1981). In addition, specific grants of power relating to the administration of local schools are given. *Id.* § 115C-47.
South Carolina	The board of trustees of each school district has the power to set standards for scholastic achievement, control local education interests, and transfer pupils if necessary to promote the best interests of education. *S.C. Code* § 59-19-90 (1978 & Cum. Suppl. 1981).
Virginia	"The supervision of schools in each school division shall be vested in a school board. . . ." *Va. Const.* Art. VIII, Sec. 7; *Va. Code Ann.* § 22.1-28 (1978). The local boards may set curriculum and determine schedules provided the action is not inconsistent with a rule of the state board. *Id.* § 22.1-79.

CERTIFICATION OF SERVICE

I, Gwendolyn H. Gregory, hereby certify that on _____, 19 ___, I served the foregoing *amicus curiae* brief of the National School Boards Association in Support of Appellees by first class mail, postage prepaid, upon the following:

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No. 81-9

In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NO. 81-9

IN THE

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OCTOBER TERM 1981

STATE OF WASHINGTON, et al.,
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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE WASHINGTON EDUCATION ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

All parties have consented to the filing of this brief.

The Washington Education Association (WEA) is an organization of over 38,800 professional educators in the State of Washington. The WEA's purpose is to

advance the interests of the profession of teaching and to promote the cause of education in the State of Washington.

The WEA is the statewide parent organization of 243 local education associations, which are the designated local collective bargaining representatives for educational employees under Washington's Education Employment Relations Act, RCW 41.59 et seq. The WEA provides bargaining support, research services and legal assistance to these affiliates.

The WEA is also affiliated with the National Education Association (NEA), a nationwide organization of educators. The NEA has monitored desegregation efforts across the country and provided its state and local affiliates with information and advice concerning the impact of desegregation efforts on teachers.

For over ten years, the WEA has cooperated in the desegregation efforts of

school districts in Washington. It has been involved in inservice training programs to prepare teachers to participate in desegregation programs. WEA-assisted affiliates have bargained over the effects of desegregation plans on the assignment and transfer of teachers, on the curricula to be offered in special programs set up by such plans and on the training or experience necessary for teachers involved in desegregation efforts.

Local WEA affiliates represent teachers in all three of the school districts which have initiated the present litigation. As the recognized bargaining agent for certified staff in the Plaintiff-Appellee Seattle School District, the Seattle Teachers Association (STA) bargains for 2,059 classroom teachers in the district which was the target of Initiative 350. The Tacoma Association of Classroom Teachers (TACT) is the exclusive bargaining

representative of 1,550 teachers in Plaintiff-Appellee Tacoma School District. The Pasco Association of Educators (PAE) bargains on behalf of 257 teachers in the Pasco School District.

Because the implementation of Initiative 350 would restrict the desegregation programs of Washington school districts, the working environment of teachers represented by WEA and its affiliates would necessarily be affected. Reversal of the decisions of the courts below would create particularly significant changes for teachers in the Seattle, Tacoma, and Pasco schools, where desegregation programs evolving from a decade of discussion among school board members, administrators, parents and teachers would be jeopardized by implementation of Initiative 350.

SCOPE OF BRIEF

The Washington Education Association adopts the Statement of Facts presented by Appellees Seattle School District, et al. Since the WEA also supports the legal arguments made by appellees, the purpose of this brief is not to duplicate the appellee's arguments but to discuss the impact of Initiative 350 on education. Should this Court decide to reverse the decisions of the courts below and allow the implementation of Initiative 350, such a decision would severely hinder efforts of Washington school districts to increase educational opportunities by desegregating their schools.

While this brief discusses the discriminatory impact of Initiative 350 on minority students, the WEA recognizes that this is not a case which necessarily hinges directly on discriminatory impact.

Initiative 350 is unconstitutional because it creates an explicit race classification and was intended to do so.

With the exception of desegregation, Initiative 350 allows mandatory busing of a student past the student's nearest or next nearest school for most, if not all, purposes for which busing is currently used (473 F. Supp. at 1010, Finding of Fact 8.3) (hereinafter cited as F.F. __). The mandatory reassignment of students in a desegregation program is thus singled out for special treatment. This creates a classification treating education matters relating to race differently from other educational matters and burdening the minority population in seeking adequate educational opportunities for their children. Since there is no compelling state interest supporting such a race classification, the

statute violates the Fourteenth Amendment in the same manner as did the housing classification in Hunter v. Erickson, 393 U.S. 385 (1969). See also, Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971).

The record amply supports the finding of the district court that this racial classification did not come about simply by coincidence. Initiative 350 was designed, marketed, and adopted in large part to frustrate desegregation efforts. The discriminatory purpose behind Initiative 350 also compels the conclusion that Initiative 350 violates the Fourteenth Amendment. See, Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).

While the impact of Initiative 350 on educational programs is not the focus of the legal analysis, the question of the initiative's impact on students does affect consideration of the legal issues of this case. Discriminatory impact is one factor to be considered in evaluating evidence of discriminatory intent under the standards of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). The educational impact of a desegregation program with mandatory busing is also important in determining whether the anti-busing policy of Initiative 350 serves a compelling state interest which will justify the constitutionality of a race classification under the strict scrutiny given to such discrimination. McLaughlin v. Florida, 379 U.S. 184, 192-196 (1964).

Finally, as an organization of concerned educators, the WEA believes that an examination of the education policies which will be frustrated by the implementation of Initiative 350 underscores the vital importance of this case. By depriving local school boards of control over student reassignment in desegregation programs, Initiative 350 severely limits school districts' ability to plan effective educational programs which address the problems of race discrimination and the impact of racial isolation.

SUMMARY OF ARGUMENT

There are many sound reasons for a Washington school district to find that a desegregation program will benefit its students. The primary reason, of course, is the elimination of the effects of intentional segregation. Even without a court finding of past discrimination, a school district has a duty to undertake a desegregation program where the district has reason to believe that intentional discrimination has occurred and has not yet been remedied. Dayton Board of Education v. Brinkman, 443 U.S. 526, 637 (1979). Discouraging school districts from undertaking voluntary desegregation programs prolongs and intensifies the disadvantages minority students suffer under segregation.

A school district may also institute a desegregation program to help eliminate racial isolation and to prepare students to live in today's pluralistic society. The

A diverse student body is a significant component of an educational program which attempts to instill in students the values of a democratic society, to teach students how to appreciate and respond to people of different races and cultures, and to provide a learning environment which stimulates the exchange of ideas.

The gains in educational achievement made by minority students are important benefits of desegregation programs. Reliable research indicates that desegregation programs have a positive impact on achievement and IQ test scores of minority students.

Both this Court and desegregation researchers have concluded that mandatory assignment plans may be necessary to a plan which is effective in reducing racial isolation and securing to its students the benefits described above. Because a voluntary desegregation program incurs

substantial expenses in advertising and operating special programs, a mandatory plan may also be a more efficient allocation of school resources than a voluntary program. For these reasons, the curtailment of a school district's control over student assignment severely limits desegregation planning and the benefits which flow from desegregation programs.

In contrast to the strong policy underpinnings of desegregation programs, the educational policy basis of Initiative 350's anti-busing policy is not substantial. Busing per se has been shown not to have any negative consequences for students. Desegregation programs in general have not had any harmful effects on white student achievement. Furthermore, the frequently cited reasons for a "neighborhood school policy", such as safety and parent cooperation, are speculative and are

outweighed by the benefits of a desegregation program which may not be effective without busing.

The language of Initiative 350 indicates that not even its drafters believed that the educational advantages of "neighborhood schools" are substantial. The broad exceptions of the Initiative would allow school districts to use busing for virtually all purposes except desegregation. There is, however, no principled basis in a neighborhood schools policy *per se* for distinguishing between busing for desegregation and busing for other educational purposes.

ARGUMENT

I. A State Law Which Frustrates Desegregation Programs Interferes With a School District's Duty To Provide a Sound Education To All Students and Places Special Burdens On the Efforts of School Districts and the Minority Population To Provide Educational Opportunities for Minority Children

Washington school districts have been given a broad mission in planning educational programs for their students.[1] The responsibility of the Washington school system includes much more than teaching reading and writing.

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[1] The court of appeals below was correct in its assessment that in Washington the education of children in elementary and secondary grades is primarily a matter of local control. (633 F.2d at 1346). "The determination of educational goals, programs and curricula is a matter within the broad discretion of the school board." Peters v. South Kitsap School District, 8 Wn. App. 809, 817, 509 P.2d 67, 73 (1973). See e.g., R.C.W. 28A.58.103, R.C.W. 28A.59.180. Although this discretion is not unlimited, the limitations set by state rules operate as accreditation standards rather than as the directives of a centrally planned educational program. The Washington Supreme Court has found that the state has a duty to provide an ample education for its resident children. Yet

The Washington Supreme Court has recognized that the state's children have a right to be provided "broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas." Seattle School District No. 1 v. State of Washington, 90 Wn.2d 476, 517, 585 P.2d 71, 94 (1978). The court found that the education system is not an institution which can remain isolated from problems which citizens face outside the classroom but is an enterprise with wide-ranging and crucial goals. The court stated:

(footnote 1 continued)

it has also recognized that much of the task of carrying out this duty has been delegated to the local school districts. Seattle School District No. 1 v. State of Washington, 90 Wn.2d 476, 535, 585 P.2d 71, 103 (1978).

> Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to insure that system's survival. . . . It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding.

90 Wn.2d at 517-518, 585 P.2d at 94.

In meeting the task of providing a full education to Washington school children, a local school district may find that a desegregation plan serves several important purposes. Although some of these purposes are significant in assuring to all children their right to an ample education, we show below that minority children are especially benefited. Thus, as Initiative 350 dismantles or prevents effective desegregation plans, it would have an especially severe impact on the educational opportunities of minority students.

A. Requiring a court order before a school district may implement the full range of segregation remedies places a heavy and unnecessary burden on school districts and the minority populations affected

The most fundamental reason for implementing a desegregation program is, of course, the need to eliminate the effects of race discrimination. Washington schools are under a clear duty to provide equal educational opportunities for all students.

The Washington Constitution guarantees the state's resident children an education "without distinction or preference on account of race, color, caste, or sex." Wn. Const. art. 9, § 1. The Fourteenth Amendment to the United States Constitution also guards this right and places an affirmative duty on school districts to provide a remedy when the right has been violated. As this Court ruled in Green v. County School Board of New Kent County,

391 U.S. 430, 437-438 (1968), school boards which have operated intentionally segregated school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." See also, Dayton Board of Education v. Brinkman, 443 U.S. 526, 537 (1979).

Initiative 350 will frustrate the performance of this duty in a school district which finds evidence of past intentional segregation but which has not been adjudicated to be in violation of its constitutional duty. The language of the Initiative allows mandatory busing for desegregation purposes only when a court of competent jurisdiction chooses to order it.[2] R.C.W. 28A.26.060.

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[2] Despite the clear language of the initiative, the State claims that an unpublished Washington Attorney General's opinion removes Initiative 350 as an obstacle to a

Thus under the Initiative's terms, a school district cannot voluntarily adopt a busing program when, in its view, such a program is needed to eliminate segregation "root and branch". It must await litigation and a court order. A school district may find itself in the dilemma of believing intentional discrimination to have occurred, but having nonetheless to be a defendant in desegregation litigation, which is

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(footnote 2 concluded)

school district which, before court adjudication, finds itself under a constitutional duty to desegregate. (Brief for Appellants, pp. 37-8.) The Attorney General's opinion, however, finds no support in the language of Initiative 350. Moreover, the Attorney General acknowledges that his interpretation does not remove the risk of litigation from such a school district. Rather, a district which in good faith adopts a busing plan to avoid the Scylla of Fourteenth Amendment litigation is likely to be faced with the Charybdis of an Initiative 350 lawsuit.

frequently costly, complicated, devisive, and protracted.[3]

The limited funds available to schools would then be spent on litigation rather than on needed educational programs. In addition, such litigation and the resulting diversion of scarce funds could needlessly polarize the school community.

A policy requiring litigation in order to sanction full remedial measures places a disproportionate and unjustified burden on minorities to marshal the resources needed to initiate and prosecure each litigation. The lack of such resources will preclude the remedy of many valid race discrimination claims.[4]

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[3] "It is not unusual for the process to span a decade and encompass 25 reported judicial opinions costing in excess of a million dollars." U. S. Comm'n on Civil Rights, With All Deliberate Speed: 1954-19??, 38 (1981).

[4] See H.R. Rep. No. 94-1558, 94th Cong., 2d Session 2-3 (1976).

Even with a successful lawsuit, the length of litigation prolongs the denial of educational opportunities to the victims of discrimination. This Court has long recognized the detrimental effects segregated schools have upon black children. Brown v. Board of Education, 349 U.S. 294 (1955). (See Section I.(C), infra, pp. 26-34.) Requiring court adjudication before the imposition of a remedy which a school board is willing to adopt voluntarily unnecessarily burdens minority children in segregated schools.

B. The reduction of racial isolation in school systems is an important strategy for an educational proram designed to teach students in a pluralistic society

This Court has recognized the broad discretion given to school districts in designing educational programs which will meet the needs of their students. In Swann

v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971), this Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ration of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . .

In the present case, not only have local school districts made a similar policy determination (Exhibit 9), but this policy has been endorsed by the Washington State Board of Education. The State Board has concluded that "[T]he presence in a school of children from different racial and socioeconomic backgrounds is an important element in the preparation of young people for active participation in pluralistic democracy." (Ex. 117.)

A policy to prevent racial isolation serves several important teaching purposes. It is part of the way that students learn that there is "no one model American",[5] a value at the heart of a democratic society. Regular contact with persons from other backgrounds may also give students experience which enable them to develop skills and attitudes needed to appreciate or respond positively to persons from other cultures or racial groups.[6] In a world in which American soldiers are sent to

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[5] Position statement of the American Association of Colleges for Teacher Education, cited in Multicultural Education Through Competency-Based Teacher Education 21 (Hunter, ed. 1974).

[6] Recent national studies suggest that desegregation is having a positive impact not only students, but upon the community at large. Since 1954, public support for school integration has increased dramatically. The increase has been greater in the South, where there has been the greatest amount of desegregation, than in the North and West. Rossell, "School Desegregation and Community Social Change," 42 Law and Contemporary Problems 170-72 (1978). Moreover, studies show that adults with

Southeast Asia and American business representatives travel to the Middle East to bargain for necessary oil, such skills and attitudes may be crucial to the success of an individual or to the survival of this country.

A separate but related purpose of diversity in the student population is the provision of a learning environment which promotes the exchange of ideas among students. This Court has endorsed the value of training which comes about "through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), cited

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(footnote 6 concluded)

children attending public schools are more favorable toward desegregation than adults without school age children. Id. at 177.

in University of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J.). Such training is an important part of preparing students to participate as effective citizens in this country's political system.[7]

The reduction of racial and cultural isolation of students is not the only strategy needed to provide the educational benefits described above. All of these educational goals, however, would be far more difficult to reach in a school system in which racial isolation of students is substantial.

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[7] Although this Court's statement referred to the college environment, the Court has also recognized that elementary and secondary students are able to appreciate and exercise their First Amendment freedoms. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Moreover, the Washington Supreme Court has ruled that elementary and secondary schools must prepare students to "participate intelligently and effectively in our open political system." Seattle School District No. 1 v. State of Washington, 90 Wn.2d 476, 517, 585 P.2d 71, 94 (1978).

C. The educational achievement of minority students is increased by desegregation

Many of the desegregation programs instituted since the 1954 decision in Brown v. Board of Education, 347 U.S. 493 (1954) have been built on the belief that desegregation will remedy the deleterious impact of segregation on the education of minority children. An increase in educational opportunities from desegregation has been obvious in some respects, since desegregation has often improved the school facilities available to blacks in segregated schools.[8]

Proponents of desegregation have also argued, however, that by removing the psychological disadvantages of segregated schools, desegregation increases the

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[8] See U.S. Comm'n on Civil Rights, Fulfilling the Letter and Spirit of the Law 120-121 (1976).

opportunity of minority children to learn. While the multi-faceted nature of education makes this hypothesis difficult to measure, school achievement tests have been used in many districts to track some of the effects of desegregation and have shown that desegregation does have a positive impact for minority children on the achievement of skills measured by the test scores.

Recent reviews of desegregation studies have demonstrated that desegregation programs are associated with an increase in scores by minority students on both achievement tests[9] and IQ

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[9] Crain and Mahard, "Some Policy Implications of the Desegregation-Minority Achievement Literature", 5 Assessments of Current Knowledge About the Effectiveness of School Desegregation Strategies 175 (1981). (hereinafter "Desegregation-Minority Achievement Literature"); Crain and Mahard, "Desegregation and Black Achievement: A Review of the Research", 42 Law and Contemporary Problems 17 (1978) (hereinafter "Desegregation and Black

tests.[10] Studies of students in various types of segregated and racially mixed schools, including integrated schools which were not the result of desegregation programs, have also shown that minority students in predominantly white schools scored higher than minority students in predominantly minority schools.[11]

In an attempt to minimize the impact of Initiative 350 on minority students, the

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(footnote 9 concluded)

Achievement"). M. Weinberg, Minority Students: A Research Appraisal, 112, 327 (1975); Hawley, "The New Mythology of School Desegregation", 42 Law and Contemporary Problems 218-19 (1978).

[10] Crain and Mahard, "Desegretation-Minority Achievement Literature", at 175. Desegregation does not appear to have any effect on the achievement scores of white students. "Desegregation and Black Achievement," supra n.9, at 18.

[11] Crain and Mahard, "Desegregation-Minority Achievement Literature," supra n.9 at 173; Hawley, "The New Mythology of School Desegregation", supra n.9, at 217-218.

dissenting opinion in the court of appeals below alluded to controversy concerning such research. 633 F.2d 1338, 1354. Vague and selective citation of criticism of the desegregation studies, however, misrepresents the findings of the research and of the controversy, which has often focused on research methodology rather than results of the studies.[12]

In a 1981 review of minority achievement studies, two Rand Corporation researchers evaluated ninety-three desegregation studies. Crain and Mahard, "Desegregation-Minority Achievement Literature", supra. Crain and Mahard not only surveyed the conclusions of the studies but also reanalyzed the data base for this research. Their analysis confirmed the positive effects of desegregation in minority achievement and demonstrated that

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[12] See N. St. John, School Desegregation Outcomes for Children 36 (1975).

those research projects which were methodologically strongest showed a much clearer increase in black achievement scores after desegregation than did the less reliable studies. Id. at 183.[13]

Moreover, the desegregation studies are not only providing confirmation of the positive effects of desegregation on minority children, the studies are providing educators with information to design more effective desegregation programs. Desegregation research has identified in recent years some characteristics of a desegregation program which increase the probability of achieving success in desegregation goals such as student achievement or reduction of racial isolation. See W. Hawley, et al., Assessment of Current Strategies About the Effectiveness of School Desegregation Strategies (1981).

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[13] See also, Crain and Mahard, "Desegregation and Black Achievement", supra n.9, at 28-29.

For example, the studies indicate that "the lower the grade of first desegregation, the higher the achievement effect." Crain and Mahard, "Desegregation-Minority Achievement Literature", supra n.9 at 181.[14] Crain and Mahard found that all studies of programs in which desegregation began in kindergarten significantly enhanced minority student achievement. Id.

In addition, the studies indicate that minority achievement is "directly related to percentage of whites in the school - the more whites in the school, the higher the minority achievement." Crain and Mahard, "Desegregation-Minority Achievement Literature", supra n.9 at 195. When, however, the percentage of white students reaches an optimal point, minority achievement appears to decrease. Id. This finding suggests to

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[14] See also, Crain and Mahard, "Desegregation and Black Achievement", supra n.9, at 34.

some researchers that there needs to be a critical mass of minority students in a school to gain the full advantages of desegregation's impact on the achievement of minority students. Id.

Such findings raise significant policy issues for the planning of a desegregation program.[15] They suggest that voluntary

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[15] These conclusions also raise the question of why desegregation has increased achievement scores in the programs studied. Possible theories include the effect of black students transferring to schools with better facilities, the increased attention given to curricula development and inservice teacher training in a newly desegregated program, and higher teacher expectations of students in a racially mixed classroom than in an all-black classroom. See, Crain and Mahard, "Desegregation and Black Achievement", supra n.9, at 49; Crain and Mahard, "Desegregation-Minority Achievement Literature," supra n.9, at 174.

plans which leave some minorities in predominantly minority schools while encouraging a few minority children to integrate overwhelmingly white schools may not be as beneficial in some school districts as desegregation plans which significantly reduce racial isolation. These findings also suggest that voluntary transfer programs may not reach some of the younger children at a time when the benefits of desegregation are greatest.

Such are the questions which need to be weighed in the balance with other factors which influence desegregation planning in any particular community. The challenge is complex and Herculean. The record in this case shows that Seattle, Tacoma, and Pasco labored long and successfully to meet that challenge. Seattle, for example, conducted numerous meetings with citizenry, teachers, and students to ensure community input (Joint Appendix 127-129)

(hereinafter J.A. __). The process it pursued in formulating and implementing its plan was geared to assimilate the factors which have been shown to lead to a successful desegregation program. This Court must not now sanction the attempted instrusion of Initiative 350 upon the achievement gains possible for minority students through the desegregation process.

II. The Mandatory Reassignment Plans Forbidden By Initiative 350 Can Be Important - and Often Necessary Components - Of Effective School Desegregation Programs

In Swann v. Charlotte - Mecklenburg Board of Education, 402 U.S. 1, 29 (1971), this Court recognized "the importance of bus transportation as a normal and accepted tool of educational policy" in school desegregation cases. Indeed, the Court emphasized that "bus transportation has long been an integral part of all public educational systems, and it is unlikely

that a truly effective remedy [for constitutional violations] could be devised without continued reliance on it." North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971).

Desegregation research also indicates that a mandatory student reassignment policy is necessary in some school districts. A 1979 study found that "voluntary desegregation plans, even those including magnet schools cannot reduce racial isolation more than few percentage points in school districts over 30 percent minority."[16] Rossell, "The Effectiveness of Desegregation Plans in Reducing Racial Isolation, White Flight and Achieving a Positive Community Response," 5 Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies 4

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[16] The district court in this case found that Seattle School District was 37.3 percent minority at time of trial (473 F. Supp. at 998, FF 1.1).

(1981). Even some districts with a smaller proportion of minorities have not been able to desegregate effectively with voluntary plans. Id.

The Seattle experience demonstrates the validity of these conclusions. Despite voluntary transfer programs initiated in 1963 (473 F. Supp. at 1006, F.F. 6.2, J.A. 120), a mandatory busing plan for middle school students begun in 1972 (473 F. Supp. at 1006, F.F. 6.3, J.A. 120). and a magnet schools program publicized in the 1976-77 school year and implemented in the 1977-78 school year (473 F. Supp. at 1006, F.F. 6.5, J.A. 110, 123-24), the school district had been unable by 1977 to reduce the racial imbalance it believed was unacceptable as a matter of law and policy. The Seattle School Board concluded therefore that a voluntary student transfer plan was unlikely to eliminate racial imbalance in Seattle schools to the extent necessary

to meet the goals of the District (473 F. Supp. at 1006, F.F. 6.8, J.A. 68, 75, 106, 111, 120).

A mandatory student reassignment plan may also be necessary to design a desegregation plan which best allocates school district resources for the overall educational program of the district. The Seattle experience is again illustrative.

In evaluating the merits of a mandatory busing plan, the Seattle School District had to consider whether the money spent in designing, implementing, and advertising programs to attract voluntary transfer students could be better spent in upgrading basic education. The Board also needed to decide whether an inefficient voluntary busing program which travelled through several neighborhoods to pick up students was worth the benefits which a voluntary busing plan produced (J.A. 72, 111).

Furthermore, to the extent that voluntary busing plans in Seattle produced change in the racial composition of the schools, this change was brought about by the voluntary transfer of a disproportionate number of minority students (473 F. Supp. at 1006, F.F. 6.7). The Seattle Board was thus faced with the question of whether a voluntary program was the most equitable manner of desegregation.

These questions are critical to the design of an efficient desegregation plan effective in meeting goals set by the school district. They are also questions which are best answered through the deliberations of the local community and the local school board, the body which is answerable to the local electorate, R.C.W. 28A.57.312, charged with development of the school district budget, R.C.W. 28A.65.415, and responsible for labor negotiations with its staff. R.C.W. 41.59 and 41.56.

Denying school districts the alternative of mandatory student reassignment to schools other than those nearest or next-nearest a student's home cripples a school district's ability to tailor a desegregation program to meet the needs of its students and community. Furthermore, in practice, a prohibition on busing places the burden of desegregation on minority children. Initiative 350 thus hinders, and in many school districts completely prevents, a school board from designing a desegregation program which will meet the purposes of a desegregation plan in an equitable and educationally sound manner.

III. There Are No Substantial Educational Reasons For the Anti-Busing Policy Promulgated By Initiative 350

Proponents of Initiative 350 have contended that it advances the purposes of a "neighborhood school policy", which provides educational benefits independent

of the policy's effect on desegregation programs. Support is lacking, however, for the proposition that Initiative 350 serves substantial educational interests. Furthermore, the policy proposed by Initiative 350 undercuts the articulated benefits of neighborhood schools in general at the same time it mandates a neighborhood school policy for desegregation.

There is virtually no evidence that busing students away from neighborhood schools has a detrimental effect on learning. A federally sponsored 1973 study of desegregation in 555 school districts found "no evidence that busing per se has any negative consequences." Moreover, there was "no evidence that attending one's own neighborhood school has any effects, positive or negative, on a school's achievement levels or social climate", Davis, "Busing" 2 National Opinion Research Center, Southern Schools: An Evaluation of the Effects

of the Emergency School Assistance Program and of School Desegregation 118 (1973).

Furthermore, the studies on desegregation have consistently found that desegregation programs have had no negative effect on the educational achievement of white students, at least insofar as that is measured by achievement test scores. A recent survey of desegregation studies concludes that "virtually every writer on the subject agrees" on this finding.[17] Crain and Mahard, "Desegregation and Black Achievement", supra n.9, at 18 (1978).

The contention that increased busing represents a safety hazard for students is also questionable. Statistics on student transportation show that students walking to school are two to three times more likely to be involved in accidents than

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[17] See also, N. St. John, School Desegregation Outcomes for Children 36 (1975); G. Orfield, Must We Bus? 121-124 (1978).

those traveling by bus. U. S. Comm'n on Civil Rights, With All Deliberate Speed: 1954-19?? 38 (1981); G. Orfield, Must We Bus? 134-135.

Most of the other benefits alleged to flow from an anti-busing policy are very speculative and can rarely be evaluated apart from the circumstances of the specific school district in which busing is used as part of a desegregation program.[18]

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[18] In addition to making the neighborhood schools argument, some busing foes have contended that mandatory student reassignment will lessen the effectiveness of desegregation programs by triggering "white flight". Fears about white flight, however, appear to have been exaggerated. Studies show that, even with white flight, desegregation plans with mandatory assignment do reduce racial isolation. Furthermore, the research has identified a number of factors in a busing program which will decrease white flight. See, Rossell, "The Effectiveness of Desegregation Plan in Reducing Racial Isolation, White Flight and Achieving Positive Community Response," 5 Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies 1 (1981). Thus, the impact of white flight on a desegregation program varies with the community and is subject to some control by the school board which prepares the desegregation plan.

For example, the argument that a neighborhood school policy will be less costly must be weighed against the high costs of voluntary plans which attempt to achieve similar desegregation goals. The argument that neighborhood school facilitate better home-school communication must be viewed in light of statistics showing that over half the nation's school children currently ride a school bus. U. S. Comm'n on Civil Rights, With All Deliberate Speed: 1954-19?? 37 (1981). Any change in the pattern of home-school communication thus depends on pre-desegregation busing patterns.

The language of the Initiative indicates that not even the drafters of Initiative 350 found the educational benefits of neighborhood schools to be significant except in the context of opposition to a desegregation plan. If, for example, a Washington school district finds that certain schools are "inadequate" because of

"lack of physical facilities", the district may allocate its resources either to upgrade the facilities or to bus the children in nearby attendance zones to other more adequate schools. RCW 28A.26.101. Under Initiative 350, the school district which finds that its educational program is unfit because of segregation does not have the flexibility to consider busing as a possible option for efficient allocation of its resources in remedying the problem. If the benefits flowing from a neighborhood school policy were truly substantial, there would seem to be no principled basis for distinguishing these two situations.

An examination of the alleged educational benefits of Initiative 350's anti-busing policy leads inexorably back to the central legal question of whether the actual purpose of Initiative 350 was invidious discrimination on the basis of

race. With its language providing potentially very broad exclusions regarding schools which are "inadequate" because of "lack of physical facilities" or "overcrowding", the so-called "neighborhood schools" policy of Initiative 350 could be interpreted to justify mandatory student reassignment for almost any purpose but school desegregation.

An evaluation of the eductional effects of the anti-busing policy of Initiative 350, therefore, would not be complete without consideration of the lessons which racially discriminatory laws teach. A state which mandates for its children the right to an education free of race discrimination, but allows school policies which discriminate on the basis of racial concerns or which increase for minorities the difficulties of remedying discrimination is sending out, at best, a

mixed message to its school children. Such a lesson certainly outweighs the speculative benefits of a neighborhood schools policy.

Thus, a review of objections to busing, of the alleged benefits of neighborhood schools, and of the operation of Initiative 350 reveals that the anti-busing policy of this Initiative does not contribute to a strong educational program for Washington schools.

CONCLUSION

For the above reasons, the implementation of Initiative 350 will have the effect of denying educational opportunities to all school children, with disproportionately negative effects on minority students. These considerations support the policy of allowing a local school board the flexibility to design a desegregation program without being restricted by the discriminatory proscriptions of Initiative 350.

In light of the arguments advanced by Appellees and supported by this brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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